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May 15, 1998

Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

RE: DOCKET NO. T-03175A-96-0479
DOCKET NO. T-01051B-96-0479

DOCKET NO. T-02428A-96-0417
DOCKET NO. T-01051B-96-0417

To The Commission:

Attached is a Motion for Judicial Notice of Supplemental Authority on behalf of AT&T Communications of the Mountain States, Inc. regarding the above referenced matter.

Sincerely,

Mary B. Tribby

Attachment

cc: Certificate of Service

BEFORE THE ARIZONA CORPORATION COMMISSION

JIM IRVIN
Chairman
CARL J. KUNASEK
Commissioner
RENZ D. JENNINGS
Commissioner

IN THE MATTER OF THE PETITION OF MCIMETRO ACCESS TRANSMISSION SERVICES, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, AND CONDITIONS PURSUANT TO 47 U.S.C. §252(b) OF THE TELECOMMUNICATIONS ACT OF 1996.	)	DOCKET NO. T-03175A-96-0479 DOCKET NO. T-01051B-96-0479
IN THE MATTER OF THE PETITION OF AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS AND CONDITIONS WITH U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. §252(b) OF THE TELECOMMUNICATIONS ACT OF 1996	)	DOCKET NO. T-02428A-96-0417 DOCKET NO. T-01051B-96-0417 **AT&T'S MOTION FOR JUDICIAL NOTICE OF SUPPLEMENTAL AUTHORITY**

On October 24, 1997, U S WEST Communications, Inc. ("U S WEST") requested that the Arizona Corporation Commission ("Commission") relieve U S WEST of certain obligations under the interconnection agreement entered into with AT&T Communications of the Mountain States, Inc. ("AT&T") and MCIMetro Access Transmission Services, Inc. ("MCI") and that the Commission modify the interconnection agreements to indicate a change in U S WEST's obligations regarding combinations of unbundled network elements. AT&T filed a response to the U S WEST request on November 6, 1997.

On November 20, 1997, AT&T filed a request that the Commission take judicial notice of a November 6, 1997 order of the Minnesota Public Utilities Commission in which it rejected GTE of Minnesota's claim that its approved interconnection agreement must be revised based on the Eighth Circuit Court of Appeals decision.

On February 12, 1998, AT&T filed a request that the Commission take judicial notice of a January 28, 1998 order of the Michigan Public Service Commission which supported the principle advanced by AT&T in its November 6, 1997 filing that this Commission has independent authority under state law to require U S WEST to provide unbundled network elements in combinations as currently required by the AT&T interconnection agreement.

In the intervening period, several state commissions have issued rulings which also support the principle advanced by AT&T in its November 6, 1997 filing. Specifically, a February 18, 1998 decision of the Colorado Commission held that state commissions are not preempted from ordering combinations of network elements under state law (attachment 1). A March 18, 1998 decision by the Massachusetts Commission also determined that state law was not preempted by the decision of the Eighth Circuit Court (attachment 2). A November 2, 1997 decision of the Texas Commission also determined that Eighth Circuit decisions did not require the revision of arbitration agreements on combinations issues (attachment 3). In a February 23, 1998 order denying reconsideration, the Minnesota Commission put forth the opinion that the Eighth Circuit Court did not intend to impact the already-made decisions of state commissions or to alter the substantive terms of existing interconnection agreements (attachment 4).

Further, in a December 1, 1997 order, the Idaho Commission found that it would not be prudent to disturb the arbitrator's decision on combinations despite the Eighth Circuit Court decisions (attachment 5). In its December 23, 1997 order, the Missouri Commission found that

the Eighth Circuit Court decisions did not necessitate changes in existing arbitration agreements (attachment 6). In a November 6, 1997 order, the Ohio Commission held that the Eighth Circuit Court decisions did not preclude ordering terms and conditions based on state law (attachment 7). Finally, the Oregon Commission in a January 9, 1998 order found that the Eighth Circuit Court decisions did not compel a relitigation of the terms of the interconnection agreement (attachment 8).

AT&T requests that the Commission take judicial notice of the aforementioned decisions.

RESPECTFULLY SUBMITTED this 15th day of May, 1998.

AT&T Communications of the
Mountain States, Inc.

By: Mary B. Tribby OP

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CERTIFICATE OF SERVICE

I hereby certify that the original and 10 copies of a Motion for Judicial Notice of Supplemental Authority on behalf of AT&T Communications of the Mountain States, Inc., regarding Docket Nos. T-03175A-96-0479, T-01051B-96-0479, T-02428A-96-0417 and T-01051B-96-0417 were hand delivered on this 15th day of May, 1998, to:

Arizona Corporation Commission
Docket Control - Utilities Division
1200 West Washington Street
Phoenix, AZ 85007

and a true and correct copy was hand delivered on this 15th day of May, 1998, to:

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and four (4) true and correct copies were hand delivered on this 15th day of May, 1998, to:

Mr. Jerry L. Rudibaugh
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Teresa Hunt

Decision No. C98-267

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 96S-331T

RE: THE INVESTIGATION AND SUSPENSION OF TARIFF SHEETS FILED BY U S WEST COMMUNICATIONS, INC. WITH ADVICE LETTER NO. 2617, REGARDING TARIFFS FOR INTERCONNECTION, LOCAL TERMINATION, UNBUNDLING AND RESALE OF SERVICES.

DECISION REGARDING COMMISSION AUTHORITY TO REQUIRE COMBINATION OF NETWORK ELEMENTS

Mailed Date: March 13, 1998
Adopted Date: February 18, 1998

I. BY THE COMMISSION

A. Statement

1. In prior orders in this suspension docket,[1] we had ordered U S WEST Communications, Inc. ("USWC" or "Company"), to combine network elements for competing local exchange carriers ("CLECs") ordering service in this manner. In response to the court's decision in *Iowa Utilities Board v. F.C.C.*, 120 F. 3d 753

[1] As indicated in the caption, this case concerns U S WEST Communications, Inc.'s proposed permanent tariffs for the provision of certain services (i.e., interconnection, local termination, unbundling, and resale) to competing local exchange carriers. Generally, this proceeding concerns obligations imposed upon the Company by the Telecommunications Act of 1996 and §§ 40-15-501 et seq., C.R.S.

(8th Cir. 1997),[2] however, we rescinded that requirement, but ordered USWC to file additional proposed tariffs in this proceeding indicating how it intended to make unbundled network elements available to CLECs. USWC made that filing as directed. As part of their response to the Company's proposals, AT&T Communications of the Mountain States, Inc. ("AT&T"), and Sprint Communications Company L.P. ("Sprint") suggested that, notwithstanding the Eighth Circuit Court's ruling, the Commission possesses authority under State law to order USWC to combine network elements for CLECs. In Decision No. C98-47 (Mailed Date of January 20, 1998), we set the Company's new proposed tariffs for hearing and directed that interested parties file briefs addressing the Commission's authority under State law to order USWC, as part of its interconnection and unbundling obligations, to combine network elements for competitors.

2. USWC filed a brief on this issue. In addition, AT&T, Sprint, MCImetro Access Transmission Services, Inc., Teleport Communications Group, Inc., and WorldCom, Inc. (collectively "the CLECs"), filed their Joint Brief in this matter. As expected, USWC contends that the Commission does not possess authority to order the Company to combine network elements for CLECs; the CLECs suggest that we do. Now being duly advised in the premises, we determine that the Commission is empowered under

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[2] In *Iowa Utilities Board*, the Court ruled that, under the Telecommunications Act of 1996, the Federal Communications Commission lacked authority to order incumbent local exchange carriers to combine network elements for CLECs.

State law to require USWC to combine network elements for competitors as part of its obligations as an incumbent local exchange carrier ("ILEC").[3]

B. Discussion

1. Federal Preemption of State Law

a. The primary contention of USWC is that the Telecommunications Act of 1996 ("Act"),[4] as interpreted in *Iowa Utilities Board*, prohibits the Commission from requiring it to combine network elements for competitors. In *Iowa Utilities Board* the court vacated a Federal Communications Commission ("FCC") rule which imposed upon incumbents a duty to combine network elements for CLECs, based upon the provisions of 47 U.S.C. § 251(c)(3). That statute, in part, imposes upon ILECs such as USWC the duty:

> [T]o provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that *allows requesting carriers to combine such elements in order to provide such* telecommunications service.

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[3] The propriety of such a requirement is, as explained *infra*, dependent upon factual determinations to be made based upon the hearing on USWC's new proposals. Accordingly, we do not decide here whether the Company will be required to combine network elements for CLECs.

[4] Pub. L. No. 104-104, 110 Stat. 56 (codified at various sections of Title 47, United States Code).

(Emphasis added.) The Eighth Circuit interpreted § 251(c)(3), particularly the last sentence, as precluding the FCC from levying a duty on ILECs to do the actual combining of elements for competitors. See *Iowa Utilities Board*, page 813.

b. USWC, in reliance upon this ruling, argues that the Act "forbids" a State requirement that ILECs combine network elements for competitors. According to the Company, such a requirement would contravene the Act's intent to implement competition in the local exchange market through the alternative mechanisms of unbundling of network elements and resale. In USWC's view, a requirement that it combine network elements for CLECs would, as found by the Eighth Circuit with respect to the FCC rule, "obliterate" the distinction between resale and access to network elements. Such a rule, the Company contends, is preempted by the Act.

c. Recognizing that the Act preserved State authority to prescribe access and interconnection obligations for local exchange carriers (see discussion *infra*) USWC contends that any such State requirement must be consistent with the Act, especially as interpreted by the Eighth Circuit. The Act, according to the Company, prohibits any requirement that incumbents combine network elements for competitors. Therefore, a Commission decision mandating that USWC combine network elements for CLECs would be "in direct conflict with the Act as construed by the Eighth Circuit." USWC Brief, page 2.

d. We disagree with these arguments. In the first place, to put the Eighth Circuit Court's decision in context, we note that the proceeding before the Court concerned the validity of *FCC* rules and the nature of *FCC* authority under the Act. To the extent the Court generally commented upon State authority to establish access and interconnection obligations under the Act--this issue arose in the course of the Court's invalidation of the FCC's attempts to preempt State policies (*Iowa Utilities Board*, pages 806-07)--the Court observed that the States retain independent power to adopt access and interconnection requirements. *See* discussion below.

e. As stated above, USWC argues that any State requirement that incumbents combine network elements for competitors is preempted by the Act, particularly the provisions of § 251(c)(3). State law is preempted if that law actually conflicts with Federal law, or if Federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it. *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, at 2617. In this instance (*i.e.*, on the question as to whether the Commission is empowered to order USWC to combine network elements for competitors), we agree with the CLECs that the Act is not intended to preempt State law.

f. Notably, § 251(d)(3) expressly provides:

> (3) Preservation of State access regulations--In prescribing and enforcing regulations to implement the

requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Further, §§ 261(b-c) of the Act state:

(b) Existing State regulations--Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

(c) Additional State requirements--Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

These provisions make clear that Congress, in the Act, did not intend to preempt State adoption and enforcement of access and interconnection requirements to apply to ILECs such as USWC.

g. According to the above provisions, State-imposed access or interconnection policies need only be "consistent with" the Act. In this case, USWC contends that a State requirement that it combine network elements would be inconsistent with the Act as interpreted by the Eighth Circuit. We disagree. The Court itself, in interpreting § 251(d)(3),

observed that, "It is entirely possible for a state interconnection or access regulation, order or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251 or Part II." *Iowa Utilities Board*, at 806. This observation is in keeping with our conclusion that the term "consistent with" does not require that States implement the identical regulatory policies as will prevail at the Federal level. *See Environmental Defense Fund, Inc. v. E.P.A.*, 82 F.3d 451 (D.C. Cir. 1996) ("consistent with" does not require exact correspondence, but only congruity or compatibility); *Roanoke Memorial Hospitals v. Kenley*, 352 S.E.2d 525 (Va. App. 1987) ("consistent with" does not mean exactly alike, but instead means "in harmony with" "holding to the same principles" or "in general agreement with").

h. The premise of USWC's argument that the Commission may not adopt a policy requiring incumbents to combine network elements for CLECs is that the Act, as interpreted by the Eighth Circuit, absolutely prohibits ILECs from doing the combining of elements for competitors. This premise is not supported by the Act or the Court's decision. For example, the Court did not hold that incumbents may not voluntarily agree to combine network elements for CLECs; nor did the Court hold that the combining of network elements by an incumbent would be unlawful. The Court's ruling with respect to this issue was

simply that the FCC could not compel ILECs to combine network elements for CLECs under the Act. We note that requiring USWC to do the combining of elements (assuming such a policy is permitted under State law) may very well be consistent with the intent of the Act to promote competition. *See Iowa Utilities Board*, page 816 (one purpose of the Act is to expedite the introduction of pervasive competition into the local exchange market). In this event, a State requirement that the Company combine network elements for CLECs would be consistent with the Act. Therefore, we determine that Federal law does not preempt a Commission requirement that USWC combine network elements for competitors.

2. Commission Authority Under State Law

a. Having decided that Federal law does not preempt a State policy regarding the combination of network elements, we must determine whether the Commission, in fact, possesses authority under Colorado law to adopt such a policy. USWC suggests that State law does not permit the Commission to require incumbents to combine network elements for competitors. The CLECs contend that a number of provisions under Colorado law grant the Commission authority to adopt such a requirement.

b. We find that State law provides the Commission broad authority to review network use and interconnection in the competitive market. The Joint Brief correctly points out that the Commission possesses comprehensive authority to regulate the rates, terms, and conditions of services provided by ILECs such as USWC. For example, § 40-3-102, C.R.S., provides:

> The power and authority is hereby vested in the public utilities commission of the state of Colorado and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state; to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power, and to enforce the same by the penalties provided in said articles through proper courts having jurisdiction. . . .

c. We point out that the present case is an investigation and suspension docket conducted by the Commission pursuant to the provisions of § 40-6-111, C.R.S.[5] That statute states that whenever the Commission conducts a hearing under its

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[5] In § 40-15-503(2)(g)(II), C.R.S., the Legislature directed the Commission to conduct proceedings, under § 40-6-111, C.R.S., for each telecommunications carrier that will provide unbundled facilities or functions, interconnection, services for resale, or local number portability.

provisions, ". . . the commission shall establish the rates, fares, tolls, rentals, charges, classifications, contracts, practices, rules, or regulations . . . which it finds just and reasonable." *Accord* § 40-3-111, C.R.S. (the Commission, after hearing, may determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be observed by any public utility); § 40-4-101, C.R.S. (Commission shall prescribe rules and regulations for the performance of any service furnished or supplied by any public utility). Finally, we conclude that, to the extent we determine it is necessary for USWC to combine network elements for competitors in order to promote competition in the local exchange market, such a directive to the Company would be consistent with the Legislative intent set forth in § 40-15-101, *et seq.*, C.R.S.

d. For these reasons, we conclude that State law empowers us to order USWC to combine network elements for CLECs if appropriate. Whether such an order is proper depends upon the factual investigation presently being conducted in this case. For example, the CLECs in their Joint Brief contend that the Company's proposed method of giving access to network elements to competitors (*i.e.*, the SPOT frame proposal) is discriminatory, unjust, and unreasonable. This suggestion constitutes a factual assertion which must be considered in light of the evidentiary hearing. We will issue further orders on this question in light of the evidence presented at hearing.

II. ORDER

A. The Commission Orders That:

1. We determine that the Telecommunications Act of 1996 does not preempt Commission authority under State law to order U S WEST Communications, Inc., to combine network elements for competing local exchange carriers.

2. We further determine that the Commission is empowered under State law to order U S WEST Communications, Inc., in this docket, to combine network elements for competing local exchange carriers, if we determine that such a requirement is necessary and appropriate.

3. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
February 18, 1998.

(SEAL)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT J. HIX

R. BRENT ALDERFER

Commissioners

COMMISSIONER VINCENT MAJKOWSKI
ABSENT

ATTEST: A TRUE COPY

Bruce N. Smith
Director

The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

March 13, 1998

D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-E

Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications, AT&T Communications of New England, Inc., MCI Communications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the aforementioned companies.

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1. INTRODUCTION

This Order concerns an arbitration proceeding held pursuant to the Telecommunications Act of 1996 ("the Act"). 47 U.S.C. § 252. The proceeding is a consolidated arbitration between New England Telephone and Telegraph Company, d/b/a Bell Atlantic ("Bell Atlantic", formerly "NYNEX") and its competitors, AT&T Communications of New England ("AT&T"), Brooks Fiber Communications of Massachusetts, Inc. ("Brooks Fiber"), MCI Telecommunications Corporation ("MCI"), Sprint Communications Company L.P. ("Sprint"), and Teleport Communications Group, Inc. ("TCG").

On December 4, 1996, the Department of Public Utilities (now, Department of Telecommunications and Energy, or "Department") issued an order in this proceeding ("Phase 4 Order") which set forth our rulings with regard to the method to be used by Bell Atlantic in carrying out total element, long-run, incremental cost ("TELRIC") studies to determine the prices to be charged by Bell Atlantic to competing local exchange carriers ("CLECs") for the use of unbundled network elements ("UNEs").[1] The Department followed the method set forth by the Federal Communications Commission ("FCC") in its First Report and Order dated August 8, 1996 ("Local Competition Order"). (A companion order, the "Phase 2 Order", set forth our rulings with regard to the wholesale discount to be applied to

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[1] 47 U.S.C. § 153 defines network element as "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 251(c)(3) obligates incumbent local exchange carriers to provide access to network elements on an unbundled basis to any requesting telecommunications carrier, subject to certain conditions.

the purchase by CLEC's of NYNEX retail services.) On February 5, 1997, in response to motions for clarification, recalculation, and reconsideration, the Department issued a second order ("Phase 4-A Order") with regard to the TELRIC studies and directed Bell Atlantic to submit cost studies in compliance with that Order. Most aspects of that TELRIC compliance filing (and all parts of the compliance filing with regard to resold services) were approved by the Department on May 2, 1997 ("Phase 2-B, 4-B Order"), and the remaining aspects of the TELRIC compliance filing were approved on June 27, 1997 ("Phase 4-D Order"). As part of this consolidated arbitration proceeding, the Department is currently reviewing a number of other TELRIC studies submitted by Bell Atlantic, those related to collocation, dark fiber, non-recurring charges for resold services and UNEs, and operation support systems ("OSS") for resold services and UNEs.

On November 18, 1997, Bell Atlantic informed the Department by letter that it was withdrawing one rate element -- the customer interface panel ("CIP") -- from its collocation cost study. The CIP is a digital cross-connect panel that was to have been offered by Bell Atlantic to connect individual UNEs to each other as specified by a CLEC. In its letter, Bell Atlantic asserted that in light of recent decisions by the United States Court of Appeals for the Eighth Circuit ("the Eighth Circuit Decision")[2], the Company was not required to combine UNEs on behalf of competing carriers and that it therefore declined to do so. AT&T and Sprint, on November 21 and 25, 1997, respectively, responded to Bell Atlantic's

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[2] Iowa Utilities Board, et al, Petitioners, v. Federal Communications Commission; United States of America, Respondents, 120 F.3d 753 (8th Cir., July 18, 1997, as amended on rehearing on October 14, 1997) (1997).

letter arguing that, notwithstanding the Eighth Circuit Decision, Bell Atlantic should be required to offer combinations of UNEs in Massachusetts.

On December 16, 1997, the Department held an evidentiary hearing on facts concerning the logistical and technical aspects of how a CLEC would order and how Bell Atlantic would provide uncombined UNEs and how the CLEC would arrange for the combination of those uncombined UNEs (Tr. 20, at 34-35). Bell Atlantic presented Amy Stern, director of product development for Bell Atlantic wholesale services (Tr. 25, at 7-126). AT&T presented Robert V. Falcone, division manager, local services division (Tr. 25, at 127-158).

Initial briefs were filed by Bell Atlantic, AT&T, MCI, and Sprint on January 9, 1998. Reply briefs were filed by these parties on January 16, 1998.[3]

The parties raise two types of arguments. The first is whether the state has been preempted by the Eighth Circuit Decision from requiring Bell Atlantic to offer UNE combinations. The second is whether, in light of Bell Atlantic's agreement to offer UNE combinations in earlier stages of the interconnection negotiations, it is now contractually bound by that agreement, notwithstanding the Eighth Circuit Decision.

II. THE PREEMPTION QUESTION

A. Positions of the Parties

Bell Atlantic first notes that the Eighth Circuit found that the FCC's rule requiring incumbent local exchange companies ("ILEC") to recombine UNEs "cannot be squared with

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[3] Brooks Fiber and Teleport did not file briefs in this matter.

the terms of subsection 251(c)(3) [of the Act]," and that a rule which prohibits an ILEC, such as Bell Atlantic, from separating UNEs that it may currently combine "is contrary to" that same subsection. While Bell Atlantic recognizes that a state may impose interconnection requirements on an ILEC that are not specifically mentioned in the Act, it further notes that subsection 261(c) of the Act provides that such state requirements cannot be inconsistent with the Act or with the FCC's regulations to implement the Act. Because the Court has found that an FCC requirement to offer combined UNEs "cannot be squared with" and "is contrary to" the requirements of Section 251, Bell Atlantic asserts therefore that any attempt by the state to order such a requirement would likewise be inconsistent with the Act (Bell Atlantic Initial Brief at 11-12).

Bell Atlantic further argues that the CLECs cannot attack the Eighth Circuit Decision collaterally before the Department and thereby seek, in essence, to reimpose unlawful FCC rules. It argues that the appropriate forum for review of the Eighth Circuit's Decision and this issue is the Supreme Court. Bell Atlantic asserts that the doctrine of collateral estoppel or issue preclusion is plain and applicable in this situation. It notes that AT&T, MCI, Sprint, and Bell Atlantic were all parties to the Eighth Circuit proceeding, and that Court has issued a valid final judgment deciding the question of law surrounding the recombination of UNEs. That decision, argues Bell Atlantic, is binding on those parties, and they should be precluded from relitigating this issue in the hope of attaining an inconsistent decision in another forum (id. at 11-13). Bell Atlantic argues that the Eighth Circuit decision to strike down the FCC's rules is equally applicable to a state's attempt to impose the same

requirements because the rules, in whatever jurisdiction, are contrary to the Act (Bell Atlantic Reply Brief at 1).

The CLECs in this case argue that the Department has the authority to require Bell Atlantic to offer combined UNEs pursuant to state law. Sprint, for example, argues that the Eighth Circuit Decision confirms the authority of the state to decide the issue of UNE combinations, noting that the Court recognized that "Congress intended to preserve the state's traditional authority to regulate local telephone markets . . . so long as the state rules are consistent with the requirements of section 251 and do not substantially prevent the implementation of the section 251 or the purposes of Part II" of the Act (Sprint Initial Brief at 6). Sprint further notes that the Eighth Circuit ruling was more narrow than that argued by Bell Atlantic. That ruling, argues Sprint, was a finding with regard to an FCC rule, and was not a ruling on whether any state-imposed requirement that furthers the pro-competitive policies of a state is consistent with the Act (Sprint Reply Brief at 2-4).

AT&T offers similar arguments. The Company notes that the Eighth Circuit's ruling regarding UNE combinations dealt only with a narrow question of federal law, whether the FCC had the authority under the act to require ILECs to provide UNE combinations. It argues that no question of state regulatory authority was at issue in the Eighth Circuit Decision. The Court did not have before it, and therefore did not rule on, any efforts by states acting pursuant to state law to impose obligations on ILECs beyond those provided by Section 251 of the Act. In fact, notes AT&T, the Court was explicit in acknowledging this fact, leaving "to another day any determination of whether a specific state access or

interconnection regulation is inconsistent with the Section 251 or substantially prevents the implementation of Section 251 or Part II" (AT&T Initial Brief at 13-14, citing Iowa Utilities Board, 120 F.3d at 807, n.27).

AT&T asks us to recognize that Bell Atlantic is not arguing that the provision of UNE combinations is illegal; rather Bell Atlantic is arguing that it is beyond the authority of any state or federal regulator to require it to provide such combinations when it does not choose to do so. This position, says AT&T, is unsupported by the Act or the Eighth Circuit's Decision (id. at 17). AT&T explains that if it is not inconsistent with the Act for Bell Atlantic voluntarily to provide a UNE combination, then it cannot be inconsistent with the Act for a state commission, acting under independent state law, to impose a requirement that it do so (id. at 18).

MCI also offers the view that the Eighth Circuit Decision was narrowly focused, finding that the FCC could not rely on subsection 251(c)(3) of the Act as a source of authority to promulgate rules requiring ILECs to combine UNEs. Nothing in the decision, argues MCI, prohibits a state commission, acting independently of the Act and pursuant to state authority, from requiring an ILEC to combine UNEs at the request of a CLEC (MCI Initial Brief at 10). As a general matter, says MCI, various sections of the Act expressly acknowledge independent state authority to regulate telecommunications services. Hence, the Department is not precluded from directing Bell Atlantic to combine UNEs at a CLEC's request (MCI Initial Brief at 11-12). This authority, argues MCI, is inherent in the Department's jurisdiction, as codified in G.L. c. 159 (id. at 14-16).

B. Analysis and Findings

There is no disagreement that the Eighth Circuit's Decision, unless overturned by the U.S. Supreme Court,[4] precludes the FCC from requiring an ILEC to offer UNE combinations to a CLEC. Likewise, there is no disagreement that an ILEC can voluntarily offer UNE combinations to a CLEC. The disagreement rather is whether the Act permits this Department, acting under the broad authority granted to it by the General Court, to order an ILEC to do something which the FCC, under the Act, cannot order.

We begin by quoting the relevant portion of the Eighth Circuit Decision in its entirety.

> Combination of Network Elements
>
> We also believe that the FCC's rule requiring incumbent LECs, rather than the requesting carriers, to recombine network elements that are purchased by the requesting carriers on a unbundled basis, 47 C.F.R. § 51.315(c)-(f), cannot be squared with the terms of subsection 251(c)(3). The last sentence of subsection 251(c)(3) reads. "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C.A. § 251(c)(3) (emphasis added). This sentence unambiguously indicates that requesting carriers will combine the unbundled elements themselves. While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements. The FCC and its supporting intervenors argue that because the incumbent LECs maintain control over their networks it is necessary to force them to combine the network elements, and they believe that the incumbent LECs would prefer to do the combining themselves to prevent the competing carriers from interfering with their networks. Despite the Commission's arguments, the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves:

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[4] On January 12, 1998, the U.S. Supreme Court agreed to review the Eighth Circuit Decision.

> the Act does not require the incumbent LECs to do all of the work. Moreover, the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them.
>
> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. § 51.315(b), which prohibits an incumbent LEC from separating network elements that it may currently combine, is contrary to § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis.
>
> Consequently, we vacate rule 51.315(b)-(f) as well as the affiliated discussion sections.

Iowa Utilities Board, 120 F.3d at 813.

We also quote the section of the Act concerning reservation of state authority.

Subsection 261(c), entitled "Additional State Requirements," provides that:

> Nothing in this part [i.e., Part II, comprising sections 251 to 261] precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part.

Subsection 261(c) negates any inference or argument that Congress sought to occupy the telecommunications field entirely and thereby to oust the states from any, even interstitial, regulation. See e.g., Campbell v. Hussey, 368 U.S. 297 (1961). But insofar as the Act does speak to a particular question, there must be no conflict between a state's

actions and the Congressional enactment in order for state regulation to be permitted to supplement Federal requirements. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963); Rice v. Santa Fe Elevator Co., 331 U.S. 218 (1947). Where, however, state action conflicts with a Congressional act governing interstate commerce, state action is invalid. Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965).

Thus, as a general matter, some measure of state authority is reserved by the Act; but we would need to address whether, given this well-known principle of federalism and the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, restated in subsection 261(c), a determination by the Department to require the provision of UNE combinations would be inconsistent with subsection 251(c)(3) of the Act.

On the general question of state authority, it is quite clear that the Department has authority to rule on issues central to the furtherance of telecommunications competition in the state. The Department is granted broad supervisory authority over telecommunications companies in G.L. c. 159. No one claims that the Act preempts Chapter 159; nor have we the power so to find. Spence v. Boston Edison Co., 390 Mass. 604, 610 (1983); Dispatch Communications of New England, D.P.U./D.T.E. 95-59-B/95-80/95-112/96-13, at 12 n.11 (1998). The question is what scope the Act and Chapter 159 together afford this Commission for action on the UNE question. In particular, Sections 12 and 16 of G.L. c. 159 provide that the Department may inquire into and adjust the regulations and practices of telecommunications carriers in the state. That authority was used over a decade ago to introduce competition in the state. IntraLATA Competition, D.P.U. 1731 (1985). Since that

time. Chapter 159 has undergirded other principles established by the Department. See e.g., New England Telephone, D.P.U. 93-125 (1994); New England Telephone, D.P.U. 94-50 (1995). If it is clear that the issue of UNE combinations is relevant to the public policy goals we have set forth in the past, it would be appropriate for us to consider that issue under the broad authority granted to us by the General Court, subject to the restriction that our rulings not be inconsistent with the Act.

In this case, the Eighth Circuit Decision guides our finding. We agree with the CLECs that the Court did not expressly address the issue of state authority over UNEs in its decision. The specific issue raised was whether the FCC had the authority to order ILECs to combine UNEs, and the Court found that the FCC did not have that authority. However, in reaching the conclusion that the FCC exceeded its authority, the Eighth Circuit based its reasoning on the requirements of the Act -- not just the identity of the agency issuing the rules -- and therefore, the Court's reasoning could be applied with equal force to any similar rule or decision issued by the Department. The Department notes that the Eighth Circuit Decision is being debated widely across the country, and that the question of its applicability to the states is central to this debate.[5]

In light of the Eighth Circuit Decision and ensuing debate, the Department finds that

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[5] To date, five states have addressed this issue, four of which have declined to find that the Act prohibits ILECs from providing UNE combinations. See Michigan Public Service Commission, Case No. U11551 (1998); Idaho Public Utilities Commission, Order No. 27236 (1997); Public Utility Commission of Texas, PUC Docket Nos. 16189, et al. (1997); Public Utilities Commission of Ohio, Case No. 96-922-TP-UNC (1997). Compare Public Service Commission of Maryland, Case No. 8731 Phase II(c).

it would not be productive in achieving our larger goal of completing the arbitrations to challenge the Eighth Circuit conclusion by requiring Bell Atlantic to combine UNEs in the exact manner prescribed by the FCC and proscribed by the Court. Therefore, we are ordering the parties back to negotiations as discussed further below.

We must address another important concern with respect to UNEs before we proceed to the negotiation and contractual issues raised by the parties in this proceeding. Relying upon the evidence brought forth in this proceeding, AT&T has succinctly set forth a number of consequences of the manner in which Bell Atlantic proposes to require a CLEC to combine UNEs, i.e., through the use of collocation facilities in every central office in which the CLEC chooses to purchase this array of services. We quote from AT&T's Initial Brief:

> First, the end result of all of Bell Atlantic's proposed network rearrangements is to recreate precisely the same service functionality that the customer had to begin with. No improvement in service quality or network efficiency is created by any of this network reengineering. See, e.g., Tr. Vol. 25, pp. 67-68. To the contrary, there will be a material degradation of service quality. Every additional interconnection is a potential point of failure. Tr. Vol. 25, pp. 66, 146. The multiple human and computer coordinations required to "hot cut" service to a CLEC customer will inevitably result in service interruptions. See, e.g., Tr. Vol. 25, pp. 82-83, 144-146.
>
> Bell Atlantic's proposed network reengineering requirements will result in substantial additional (and totally unnecessary) costs, almost all of which will be imposed on the CLECs. There will be substantial costs incurred to establish physical collocation facilities at every Bell Atlantic central office by every CLEC that wishes to purchase UNEs. There will be multiple "SAC" [service access charge] charges and nonrecurring charges for the central office interconnections. Tr. Vol. 25, pp. 11, 14. There will be undetermined but undoubtedly significant costs to "overlay" copper feeder plant where a fiber

> feeder link is already in place (or, alternatively, even greater cost for "expensive" demultiplexing equipment). Tr. Vol. 22, pp. 46-47, see also Tr. Vol. 25, pp. 103, 104.
>
> Finally, Bell Atlantic's policy will ensure that no CLEC order for UNEs will ever be able to flow through Bell Atlantic's ordering and provisioning OSSs [operational support systems] in the way that Bell Atlantic's own customer orders will flow through. See, e.g., Tr. Vol. 21, pp. 95-98; Tr. Vol. 22, pp. 53; Tr. Vol 25, pp. 39-40, 89. This fact has both quality of service and cost consequences. Bell Atlantic's OSSs are designed to provide service ordering and provisioning on an electronic basis with a minimum of human intervention. The new policy will ensure that CLECs, unlike Bell Atlantic, never have the benefits of the electronic flow through systems. Thus, while Bell Atlantic can provide service to its own new customer for a one-time charge of $13.88 (Tr. Vol. 22, pp. 34, 63), it will impose literally hundreds of dollars in NRC [nonrecurring charges], OSS and collocation charges on a CLEC wishing to provide the same service to the same customers. See Tr. Vol. 21, pp. 102-106.
>
> In conclusion, it cannot be overemphasized that all of the foregoing service quality and cost consequences are totally unnecessary. See, e.g., Tr. Vol. 21, pp. 96-98, Tr. Vol. 25, pp. 43-44. They result in no service improvement, no increase in functionality, no increase in network efficiency. They simply make it more expensive and more difficult for Bell Atlantic's competitors to serve their customers.

AT&T Initial Brief, at 9-10 (emphasis and footnote omitted).

Similar points were raised by MCI and Sprint, and these consequences are uncontroverted. Bell Atlantic has left them unaddressed and chosen instead to rely on purely legal arguments in support of the policy decision it urges upon us. Those legal arguments we have already addressed. We cannot, however, ignore the consequences, since they have important implications for the successful introduction of competition in Massachusetts, a major goal of the Department. Bell Atlantic's response to the Eighth Circuit Decision does not advance our or the Act's policy to create efficiency-enhancing conditions that would

allow local exchange competition to develop and to deliver price and service benefits to customers. Consequently, Bell Atlantic's policy is not conducive to its own goal of receiving authority from the FCC, under Section 271 of the Act, to originate interLATA calls in Massachusetts."

We believe, based on the record in this case, that Bell Atlantic's chosen method of provisioning UNEs solely through collocation may not be adequate to meet the Act's UNE provisioning requirements in Subsection 251(c)(3). We cannot approve an arbitrated agreement that contains provisions not consistent with the Act's Section 251 requirements. While it is true that the Eighth Circuit found that the FCC may not require ILECs to combine network elements, the Eighth Circuit also found that "a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network,"[7] and that a requesting carrier is not required "to own or control some portion of a telecommunications network before being able to purchase unbundled elements."[8] Based on the record, it is clear that collocation requires a competing carrier to own a portion of a telecommunications network, so making collocation a precondition for obtaining UNEs appears to be at odds with the Eighth Circuit's

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[6] Under the Act, Bell Atlantic must notify this Department of its intent to seek Section 271 certification from the FCC when it requests the right to offer intra-region, interLATA, long-distance service. The Act gives this Department the obligation and the right to comment on that filing to the FCC. 47 U.S.C. § 271(d)(2)(B).

[7] Iowa Utilities Board, 120 F.3d at 814.

[8] Id.

findings.[9] Therefore, unless Bell Atlantic can demonstrate convincingly that its collocation requirement is consistent with the Act and the Eighth Circuit's findings, it must develop an additional, alternative or supplemental method for provisioning UNEs in such a way that they can be recombined by competing carriers without imposing a facilities-requirement on those carriers. Without this additional method, we believe that Bell Atlantic's insistence on collocation as the only answer to the UNE question very well may not meet the Act's Section 251 interconnection requirements as they relate to the provisioning of UNEs, and, consequently, that Bell Atlantic might not meet the requirements of the Section 271 interconnection "checklist." Opportunity remains, however, to avert so untoward an outcome.

In light of the Eighth Circuit Decision, Bell Atlantic might consider a different approach -- an approach alternative or supplemental to collocation. Recognizing the network efficiencies that would result from combining UNEs in the manner proposed by the CLECs -- the method Bell Atlantic had planned to use for the months leading up to the ruling, using OSSs designed precisely for this purpose -- Bell Atlantic still may voluntarily agree to provide such combinations. Indeed, such voluntary recombination by an ILEC might well

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[9] The FCC states that it is "still evaluating the implications of these rulings and whether they may compel a result that would require methods other than or in addition to collocation for combining network elements." FCC 97-418, Memorandum Opinion and Order, CC Docket No. 97-208, released December 24, 1997, ¶ 199 ("FCC South Carolina Order").

plant "the seeds of Section 271 success."[10] Alternatively, it might propose an approach suggested by FCC Commissioner Michael K. Powell in his separate statement in the FCC's decision to reject Bell South's petition for 271 authority in South Carolina, in which UNEs would be recombined voluntarily by ILECs for what Commissioner Powell labelled a modest "glue charge."[11] In this way, UNEs could be provided by Bell Atlantic in a way that contributes to efficiency, an important goal of economic regulation, and therefore to the further development of local exchange competition -- while avoiding a potentially fatal defect in Bell Atlantic's compliance with the Act's Section 251 interconnection requirements and the Section 271 checklist. Compliance with the Act's Section 251 interconnection and Section 271 "checklist" requirements is the linchpin for further progress toward and final achievement of open and more competitive markets for both local and long-distance service. Success in meeting those requirements is an important goal for this Department. Otherwise, local exchange competition in Massachusetts and Bell Atlantic's prospects for receiving interLATA authority will both be harmed, to the ultimate detriment of Massachusetts consumers.[12]

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[10] FCC South Carolina Order, Separate Statement of Commissioner Michael K. Powell, p. 1.

[11] Id. at 2. The Department recognizes that the level at which such a charge might properly be set could be a subject of debate and offer yet another opportunity to obstruct our goal of increased intraLATA and interLATA competition.

[12] To date, the record of the Bell Operating Companies ("BOCs") in satisfying the FCC's Section 271 requirement is disappointing as evidenced by failure any BOC to obtain FCC approval. The goal of this Department with respect to Bell Atlantic's

(continued...)

In light of our conclusions above, the Department orders the parties to return to negotiations on the issue of UNE provisioning. The parties are to report to the Department on the status of those negotiations two weeks from the date of this Order. If the parties are unsuccessful in reaching agreements regarding UNE provisioning, the Department will proceed to arbitration on this issue.

III. THE NEGOTIATION AND CONTRACTUAL ISSUES

We now address the negotiation and contractual issues raised by the parties in this proceeding.

A. Positions of the Parties

AT&T and MCI argue that, in the months leading up to the Eighth Circuit Decision, Bell Atlantic had agreed, during the negotiations of interconnection agreements, to provide combinations of UNEs. They claim that Bell Atlantic is now reneging on those commitments, and they argue, as a matter of contract law and under the terms of the Act, that Bell Atlantic should have to stand by the earlier agreements. AT&T, for example, notes that because Bell Atlantic and AT&T had reached a negotiated agreement that Bell Atlantic was to provide UNE combinations, AT&T's petition for arbitration did not list this issue as "unresolved" and thus subject to arbitration. AT&T asserts that Bell Atlantic's attempt to

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[12](...continued)

Section 271 filing is to succeed in implementing the Act's interconnection and Section 271 requirements by doing it once and doing it right. Sound treatment of the UNE issue will advance us toward that goal. In the larger scheme, this goal is far more important than protracted skirmishing over the UNE issue. This strategic objective should not be jeopardized for mere tactical gain.

reopen issues settled during the negotiation stage of the process and not identified as issues open for arbitration would render meaningless the Act's requirement that parties identify issues open for arbitration. It cites similar cases and orders by the Ohio and Texas public utilities commissions in support of its conclusions (AT&T Initial Brief at 27-29).

Likewise, MCI asserts that the course of conduct of Bell Atlantic and MCI during their negotiations established that agreement had been reached on the issue of UNE combinations. It argues that Bell Atlantic should not be permitted to create a disputed issue where none existed earlier. MCI argues that the Department should enforce the contractual obligation it asserts has been created during the negotiation process (MCI Initial Brief at 4-9).

In reply, Bell Atlantic asserts that its earlier agreement to provide UNE combinations was not voluntary but was imposed upon it by the FCC's interpretation of the Act, an interpretation since found to be in error by the Eighth Circuit. It argues, therefore, that it should not be bound by those agreements, and that, in any event, it has made clear during this proceeding that it was reserving its rights to revisit issues based on later judicial determinations (Bell Atlantic Reply Brief at 2, 11) It further points out that the negotiated agreements contain a provision stating, in essence, that the terms would be subject to renegotiation if regulatory changes occurred that made those terms obsolete (id. at 11). Bell Atlantic also argues that it has no contract with AT&T, Sprint, or MCI, and where there is no contract with a party, there is no merit to a contractual claim (id. at 2).

B. Analysis and Findings

Each of the interconnection agreements for the parties in this consolidated proceeding is at a different stage: the Brooks Fiber agreement is completed and signed, and has been approved by the Department (see D.T.E. 97-70 (1997)); the arbitration sessions and Department's orders for the AT&T agreement are completed, but the agreement has not been signed; the arbitration sessions and Department orders for the Sprint agreement are completed, and we understand that Sprint was awaiting the specific language of the AT&T agreement to serve as a model for its agreement; the MCI arbitration sessions have been completed by the arbitrator, but his awards remain subject to the Department's review of exceptions submitted by the parties; and the arbitration sessions and Department orders for the TCG agreement are completed, and the agreement is under Department review.

We recognize that, had the Eighth Circuit Decision been issued before the start of negotiations, Bell Atlantic might have refused, at that time, to offer UNE combinations to the CLECs, even though it would have been technically feasible to offer them. We can surmise that this issue would then have been added to the list of disputed items that would be subject to arbitration. On the other hand, Bell Atlantic might have volunteered to offer UNE combinations during such a negotiation, trading that provision in the variety of "gives" and "takes" that are inherent in any such negotiation. These and other possibilities, however, are speculative and do not help to inform our decision on this issue.

The Act creates an obligation on parties to an interconnection negotiation to indicate to the Department which issues are unresolved in that negotiation and are therefore subject to

arbitration. 47 U.S.C. § 252(b)(4)(A). While the Department has attempted to be flexible in the early months of the arbitrations with regard to the deadlines provided by the Act, the Department has been guided by these deadlines in anticipation of achieving the Act's intention of producing interconnection agreements in a brief period of time so that the benefits of competition envisioned in the Act could reach the consumers of Massachusetts. Although several issues remain to be litigated in this consolidated arbitration proceeding, all of those issues were identified in the initial petitions or were natural extensions of those issues as the arbitration proceeding has evolved. Thus, for example, the CLECs and Bell Atlantic disagreed on whether Bell Atlantic should provide dark fiber as a UNE; Bell Atlantic was ordered to do so; and, as a natural extension of that decision, the pricing methodology for that UNE is now being litigated. In those instances in which issues were stated as unresolved in the petitions, and where the parties recognized that the arbitration was likely to take an extended period of time (e.g., pricing and performance standards), "placeholders" in the interconnection agreement were inserted.

We first address the AT&T interconnection agreement. We assume, for purposes of this analysis, that an agreement is completed, in that all disputed provisions have been arbitrated and an order issued by the Department. AT&T/NYNEX Arbitration, D.P.U. 96-80/81 (August 29, 1997). As Bell Atlantic has noted, a generic provision was included in the approved language of this agreement which states, "[I]n the event that as a result of any decision, order or determination of any judicial or regulatory authority with jurisdiction over the subject matter hereof, it is determined that [Bell Atlantic] shall not be required to furnish

any service or item or provide any benefit required to be furnished or provided to AT&T hereunder, then AT&T and [Bell Atlantic] shall promptly commence and conduct negotiations in good faith with a view toward agreeing to mutually acceptable new terms..." (Bell Atlantic Reply Brief at 11-12). As we have found above, the Eighth Circuit Decision is a clear example of such a decision. We conclude, therefore, that AT&T has a right to expect Bell Atlantic to commence good faith negotiations in accordance with the agreement.

We next address the Sprint interconnection agreement. As in the case of the AT&T agreement, the Department has completed its review of disputed items. Sprint/NYNEX Arbitration, D.P.U. 96-94 (January 15, 1997). Our understanding, based on correspondence from Sprint, is that it was awaiting the final version of the AT&T agreement as a model.[13] Accordingly, the conclusion we have reached with regard to the AT&T agreement is also applicable to Sprint. Sprint has a right to expect Bell Atlantic to commence good faith negotiations in accordance with the agreement.

We next address the MCI agreement. As we have noted above, the parties have filed exceptions to the arbitrator's awards with the Department. Nonetheless, the draft agreement has provisions which are similar to those of the AT&T agreement. Accordingly, the conclusion we have reached with regard to the AT&T agreement is also applicable to MCI.

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[13] "Sprint wants to ensure that it is offered comparable terms and conditions as those granted to other competitors, such as AT&T. Therefore, Sprint respectfully requests an extension of time, until two weeks after AT&T files its interconnection agreement, to file its interconnection agreement with the Department." Letter from Cathy Thurston, Attorney for Sprint, to Mary Cottrell, Secretary to the Department, January 14, 1998.

MCI has a right to expect Bell Atlantic to commence good faith negotiations in accordance with the agreement.

Brooks Fiber and TCG have not offered comments on this issue of UNE combinations. To the extent their agreements provide for renegotiation in the face of changes to statutory interpretations or regulatory changes, they, too, have the right to pursue renegotiations with Bell Atlantic.

IV. ORDER

After due consideration, it is

ORDERED: That Bell Atlantic, AT&T, Brooks Fiber, MCI, Sprint, and TCG return to negotiations on the issue of UNE combinations, and report to the Department on the status of those negotiations two weeks from the date of this Order; and it is

FURTHER ORDERED: That Bell Atlantic and its competitors, AT&T, Brooks Fiber, MCI, Sprint, and TCG, complete, and file for Department review, interconnection agreements consistent with the Act and the terms of this Order.

By Order of the Department,

Janet Gail Besser, Chair

John D. Patrone, Commissioner

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

A true copy
Attest:
MARY L. COTTRELL
Secretary

PUC DOCKET NOS. 16189, 16196, 16226, 16285, 16290, 16455, 17065, 17579, 17587, AND 17781

AMENDMENT AND CLARIFICATION OF ARBITRATION AWARD

DOCKET NO. 16189 PETITION OF MFS COMMUNICATIONS COMPANY, INC. FOR ARBITRATION OF PRICING OF UNBUNDLED LOOPS	§	PUBLIC UTILITY COMMISSION OF TEXAS
DOCKET NO. 16196 PETITION OF TELEPORT COMMUNICATIONS GROUP, INC. FOR ARBITRATION TO ESTABLISH AN INTERCONNECTION AGREEMENT	§	
DOCKET NO. 16226 PETITION OF AT&T COMMUNICATIONS OF THE SOUTHWEST, INC. FOR COMPULSORY ARBITRATION TO ESTABLISH AN INTERCONNECTION AGREEMENT BETWEEN AT&T AND SOUTHWESTERN BELL TELEPHONE COMPANY	§	
DOCKET NO. 16285 PETITION OF MCI TELECOMMUNICATIONS CORPORATION AND ITS AFFILIATE MCIMETRO ACCESS TRANSMISSION SERVICES, INC. FOR ARBITRATION AND REQUEST FOR MEDIATION UNDER THE FEDERAL TELECOMMUNICATIONS ACT OF 1996	§	
DOCKET NO. 16290 PETITION OF AMERICAN COMMUNICATIONS SERVICES, INC. AND ITS LOCAL EXCHANGE OPERATING SUBSIDIARIES FOR ARBITRATION WITH SOUTHWESTERN BELL TELEPHONE COMPANY PURSUANT TO THE TELECOMMUNICATION ACT OF 1996	§	

DOCKET NO. 16455	§
PETITION OF SPRINT	§
COMMUNICATIONS	§
COMPANY L.P. FOR ARBITRATION OF	§
INTERCONNECTION RATES, TERMS,	§
CONDITIONS, AND PRICES FROM	§
SOUTHWESTERN BELL TELEPHONE	§
COMPANY	§
	§
DOCKET NO. 17045	§
PETITION OF BROOKS FIBER	§
COMMUNICATIONS OF TEXAS, INC.	§
FOR ARBITRATION WITH	§
SOUTHWESTERN BELL TELEPHONE	§
COMPANY	§
	§
DOCKET NO. 17579	§
APPLICATION OF AT&T	§
COMMUNICATIONS OF THE	§
SOUTHWEST, INC. FOR COMPULSORY	§
ARBITRATION OF FURTHER ISSUES TO	§
ESTABLISH AN INTERCONNECTION	§
AGREEMENT BETWEEN AT&T AND	§
SOUTHWESTERN BELL TELEPHONE	§
COMPANY	§
	§
DOCKET NO. 17587	§
REQUEST OF MCI	§
TELECOMMUNICATIONS	§
CORPORATION AND ITS AFFILIATE,	§
MCIMETRO ACCESS TRANSMISSION	§
SERVICES, INC. FOR CONTINUING	§
ARBITRATION OF CERTAIN	§
UNRESOLVED PROVISIONS OF THE	§
INTERCONNECTION AGREEMENT	§
BETWEEN MCIM AND SOUTHWESTERN	§
BELL TELEPHONE COMPANY	§
	§
DOCKET NO. 17781	§
COMPLAINT OF MCI AGAINST SWBT	§
FOR VIOLATION OF COMMISSION	§
ORDER IN DOCKET NO. 16285	§
REGARDING CABS ORDERING AND	
BILLING PROCESSING	

On September 30, 1997, the undersigned Arbitrators issued an Arbitration Award in the above styled proceedings. Portions of that award are amended or clarified as set out below.

I. COLLOCATION ISSUE

On October 8, 1997, Teleport Communications Group Inc., (TCG) filed an agreed and unopposed motion for amendment of the above referenced arbitration award, in particular Appendix A, Issue No. 12. The motion, requests replacement of the Arbitrators' decision that collocation costs be grouped into high, medium and low categories with a decision that an average price rate design without these categories can be used. The Arbitrators grant TCG's request and replace the three-tier rate structure with the unified average rate structure proposed in Southwestern Bell Telephone Company's (SWBT's), June 27, 1997 collocation tariff filing. Appendix A, Issue No. 12 is, therefore, amended to delete the requirement that SWBT should tariff rates by grouping eligible structures in three categories: low cost, medium cost, and high cost. The Arbitrators adopt SWBT's proposed language for Issue No. 12.

II. CLARIFICATION ISSUES

On October 22, 1997 and October 30, 1997, SWBT and MCI Telecommunications Corporation and its affiliate, MCImetro Access Transmission Services, Inc. (MCI) respectively, filed motions for clarification of certain provisions of the September 30, 1997 Arbitration Award. The Arbitrators conclude that a number of these requests for clarification have merit and for that reason amend portions of the September 30, 1997 Arbitration Award as reflected on Appendix D, which is attached to this Amendment and Clarification Arbitration Award. Only those provisions of the Arbitration Award specifically referenced on Appendix D are amended, all other relief requested by SWBT and MCI in their respective motions for clarification are hereby denied.

III. COMBINING NETWORK ELEMENTS

On October 14, 1997, the 8th Circuit Court of Appeals issued an order on rehearing that addresses the combination of network elements. *Iowa Utilities Board v. Federal Communications Commission*, Nos. 96-3321, *et al*, Order on Petitions for Rehearing (8th Cir., Oct. 14, 1997). In that order, the Court reiterates a prior July 18, 1997, holding that an incumbent local exchange company (ILEC) is not obligated to combine network elements for requesting carriers and clarifies that an ILEC is not prohibited from separating network elements that may already be combined. *Id.* After considering the parties' arguments concerning the impact of the Court's October 14 Order on the current arbitration proceedings, the Arbitrators conclude that no change to the Arbitration Award is necessary on the issue of combining network elements. To the extent that the Award provides for the combining of network elements, those provisions remain in effect. The 8th Circuit's order on rehearing reveals no ground for abrogating SWBT's voluntary commitment to combine network elements.

During the arbitration hearing, SWBT made a business decision that, despite its lack of legal obligation, it would combine network elements in lieu of providing local service providers (LSPs) direct access to its network. The lack of legal obligation was made clear in a prior 8th Circuit order issued on July 18, 1997. *Iowa Utilities Board v. Federal Communications Commission*, 120 F. 3d 753 (8th Cir. 1997). In vacating the Federal Communications Commission (FCC)'s rules requiring ILECs to combine network elements purchased by requesting carriers, the Court stated:

> While the [federal Telecommunications] Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the [Federal Communications] Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements. . . . Despite the Commission's arguments, the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves . . . .

Id. at 813. At the time of the arbitration hearings in August 1997, SWBT clearly stated its understanding of its rights on the issue of combining network elements.

> Now on the issue of combining, it is crystal clear – I mean, few things are clear these days it seems – but it is crystal clear under the [8th Circuit] Court's ruling that Southwestern Bell has no legal obligation to combine unbundled network elements for the [local exchange provider] LSP or AT&T in this case.

SWBT Opening Statement, Arbitration Hearing on the Merits Transcript (Tr.) at 449 (August 12, 1997). Yet, throughout the hearing on the merits and in subsequent briefing, SWBT unequivocally confirmed that it would bundle network elements. In the same opening statement on August 12, 1997, SWBT's counsel stated "that although we have no legal obligation to combine the unbundled network elements for the LSP or AT&T in this case, we are going to be willing to do so under certain conditions." *Id.* In sworn testimony, SWBT's witnesses affirmed SWBT's willingness to provide the service of combining network elements. *See, e.g., Tr.* at 507 (". . . where we're at in the process is to continue to offer to you what we have offered in the past; and that is to actually do the connecting of the network elements."); Tr. at 541 ("And we've decided that we're willing to hold ourselves out to do the bundling.") Through its witnesses, SWBT also clarified that the conditions contemplated at the time involved when requesting carriers would not have ready access to the network, i.e., in SWBT's central offices. SWBT repeatedly expressed its concerns over allowing LSPs access to its central offices and its preference to doing the combining on behalf of the LSPs. *See, e.g., Tr.* at 506 (SWBT does not envision an LSP coming in and running jumpers themselves); Tr. at 511 (SWBT would have concerns to give LSPs direct access to the Main Distribution Frame). Finally, in a post-hearing brief, SWBT repeated its voluntary commitment to combining network elements.

> The Eighth Circuit has now spoken on the issue of combination of network elements. The Eighth Circuit clearly held that the LSP (i.e., AT&T and MCI) has the legal obligation to combine unbundled network elements. (140-141) Any combining or recombination is the obligation of the LSP and not Southwestern Bell. This being the state of the law, Southwestern Bell has decided for policy reasons that it will perform the combining of unbundled network elements on behalf of the LSP in certain situations (e.g., in the central office).

Brief of Southwestern Bell Telephone Company on the Impact of the Eighth Circuit's July 18, 1997 Decision, p. 11 (August 20, 1997). That SWBT voluntarily committed to combining

network elements, even though it understood that it had no legal obligation, could not be clearer. SWBT's recent recantation of its commitment to combine network elements and, in the alternative, its unilateral imposition of new conditions to its performance come too late.[1] The 8th Circuit's clarification on rehearing only reiterated the Court's original ruling that ILECs have no legal obligation under federal law to combine network elements.

Moreover, SWBT's explicit commitment to provide network elements in combination when requested had a substantial impact on the arbitration proceedings. Because of SWBT's commitment, the Arbitrators and the parties did not pursue the issue of appropriate terms and conditions for access to SWBT's network were LSPs to combine network elements themselves. In this respect, relying on SWBT's representations, the LSPs responded by relinquishing their right to seek direct access to SWBT's network. Furthermore, over the past year, the parties have been performing and reviewing cost studies to establish the rates to be charged by SWBT for bundling the network elements. Should the Commission have to revisit the issue of combining unbundled network elements, the issue of what constitutes fair and non-discriminatory access to SWBT's network in a competitive environment would necessarily have to be addressed.

IV. ESTABLISHING PERFORMANCE MEASURES

Subsequent to the issuance of the September 30, 1997, Arbitration Award, AT&T Communications of the Southwest, Inc. (AT&T), MCI and SWBT engaged in discussions to negotiate performance measures and benchmarks for services provided by SWBT as well as to establish monetary penalties to be imposed in the event of a specific performance breach. The parties successfully resolved a number of these issues through negotiation. The parties agreements are reflected on Commission Exhibit No. 2 admitted into the evidentiary record of

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[1] SWBT has essentially waived its right to assert that it has no obligation to combine network elements. Waiver occurs when a party intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right. *U.S. v. Olano*, 507 U.S. 725, 733 (1993); *First Interstate Bank of Ariz., N.A. v. Interfund Corp.*, 924 F.2d 588, 595 (5th Cir. 1991).

these proceedings. The issues upon which consensus was reached are set out below.

AT&T and SWBT:

1. UNE Parity Issue IV-12: Performance Data	Sections 2.1, 6.0, 8.0, 9.1 to end
2. UNE Parity Issue IV-13: Performance Measurements - Provisioning Intervals	Section 9.1, Measurements 4 through 26
3. UNE Parity Issue IV- 14: Performance Measurements - Network Outages	Section 9.1, Measurements 59 through 26
4. Performance Criteria Issue VIII-1: Application of Liquidated Damages	Sections 1.0 through 1.1.3, 3.1, 4.1, 5.1, 6.1 through 6.6, 7.1 through 7.1.2, 8.1, 8.2
5. Performance Criteria Issue VIII-2: Performance Data	Same as Item 1 (Issue IV-12)
6. Performance criteria Issue VIII-3: Performance Measurement - Provisioning Intervals	Same as Item 2 (Issue IV-13)

MCI and SWBT:

DPL Issues: 42, 103, 106, 107, 109, 110, 111, 512, 513, 516, 517, 518, 519, 521, 522, 523, 524, 525, 580, 581, 582, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, and 600.

The Arbitrators' decisions on all remaining disputed issues regarding performance measures are found on Appendices A, B, and C attached to this Amendment and Clarification to Arbitration Award.

On November 24, 1998, AT&T, MCI, and SWBT shall file a joint report describing the effect of the Arbitrators' Award on implementation of performance measures as it relates to liquidated damages.

V. REQUESTS FOR OTHER RELIEF

All other relief requested by any party is hereby denied.

SIGNED AT AUSTIN, TEXAS the 24th day of November 1997.

PUBLIC UTILITY COMMISSION OF TEXAS
FTA § 252 ARBITRATION PANEL

PAT WOOD, III, Arbitrator

JUDY WALSH, Arbitrator

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of the Complaint of MCImetro Access Transmission Services Against U S West Communications, Inc.

ISSUE DATE: February 23, 1998

DOCKET NO. P-421/C-97-1348

ORDER DENYING RECONSIDERATION

PROCEDURAL HISTORY

On September 4, 1997, MCImetro Access Transmission Systems Services, Inc. (MCImetro) filed a complaint against U S West Communications (USWC) for anticompetitive conduct. In its complaint, MCImetro alleged that USWC failed to provide adequate facilities for local service, as required by state and federal law. In addition, MCImetro alleged that USWC has engaged in a pattern and practice of anticompetitive conduct and that such conduct has created a barrier to MCImetro's entry into the local market and has hindered MCImetro in its ability to provide local telecommunications services to new customers and in its ability to provide high quality service to existing customers.

On September 16, 1997, the Commission issued a notice soliciting comments on the following three questions relating to this proceeding: (1) whether the Commission has jurisdiction over this matter; (2) Whether there are reasonable grounds to investigate all allegations; and (3) whether the Commission should treat this matter as a complaint under Minn. Rule part 7829.1700, or an arbitration under Minn. Rule part 7812.1700. The notice provided parties 10 days to respond.

On September 26, 1997, MCImetro, USWC, the Minnesota Department of Public Service (the Department) and the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG) filed comments.

On October 24, 1997, in response to motions adopted by the Commission at its October 21, 1997 meeting, USWC filed a Request for Reconsideration and Partial Dismissal of MCIm's Complaint.

On November 3, 1997, MCIm filed comments responding to USWC's request.

On November 4, 1997, the Commission issued its ORDER FINDING JURISDICTION AND INITIATING EXPEDITED PROCEEDING.

On November 17, 1997, USWC filed comments replying to MCIm's comments of November 3, 1997.

The Commission met on January 27, 1998 to consider this matter.

FINDINGS AND CONCLUSIONS

Having heard the arguments of counsel and reviewed this matter, the Commission is not inclined to reconsider its November 4, 1997 Order. USWC's basic objection is to decisions that the Commission made many months ago in the Consolidated Arbitration Proceeding[1] regarding the unbundling issue. It is now untimely to revisit that question. The Company may not avoid the untimeliness of its challenge by bootstrapping it to the November 4, 1997 Order.[2]

USWC has alleged that MCIm has "no legal basis upon which to continue enforcement of the provisions of the interconnection Agreement that require USWC to provide combinations of network elements or superior service." The heart of USWC's argument is that the Eighth Circuit Court of Appeals decision that certain FCC rules are illegal[3] automatically renders the unbundling provisions of the MCIm/USWC Interconnection Agreement void or at least unenforceable.

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[1] In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, DOCKET NOS. P-442,421/M-96-855; P-5321,421/M-96-909; P-3167,421/M-96-729, ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A US WEST COST PROCEEDING (December 2, 1996) and ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING CONTRACT (March 17, 1997).

[2] The Commission notes that its November 4, 1997 Order, which USWC requested the Commission to reconsider, does not address the unbundling provisions that USWC now asserts are "unlawful" due to the Eighth Circuit Court of Appeals decisions. In fact, at the hearing preceding the November 4, 1997 Order, USWC did not challenge Commission jurisdiction to hear MCIm's complaints regarding implementation of the unbundling provisions and simply questioned whether the Commission had jurisdiction over allegations that are independent of the provisions of the interconnection agreement. Order at page 2.

[3] See Iowa Utilities Board v. FCC, Orders dated July 18 and October 14, 1997).

However, it is not clear that the Eighth Circuit decisions had that intent or effect. The unbundling provisions that USWC has asserted s are void or unenforceable are located in an Interconnection Agreement that the Commission ordered between MCIm and USWC after an arbitration proceeding. See Orders cited in Footnote 1.

The proximate cause of the unbundling provisions objected to by USWC, therefore, are Orders of this Commission and the contractual arrangement (Interconnection Agreement) between USWC and MCIm, not the FCC provisions struck down by the Court. Until those Orders of the Commission are amended to require alteration of the USWC/MCIm Interconnection Agreement, MCIm does have a legal basis upon to seek enforcement of those provisions.

In its recent request for reconsideration, USWC did not ask the Commission to reconsider the December 2, 1996 and March 17, 1997 Orders that are the heart of the matter. Two obstacles block that approach, of course: first, a petition at this time regarding either Order is untimely, pursuant to Minn. Rules, Part 7829.3000, Subp. 1; second, USWC has already sought and been denied reconsideration of the Commission's Order regarding the unbundled network elements issue[4] and, as such, is barred from requesting reconsideration again in that point by Minn. Rules, Part 7829.3000, Subp. 7.

The Commission may always vary its rules to allow untimely reconsideration, of course, either upon request or upon its own motion, provided the grounds for granting such variances exist pursuant to Minn. Rules, Part 7829.3200. Or, the Commission can reconsider (at any time) a prior Order on its own motion. However, no request has been made for that action and the Commission is not prepared on the basis of this record to initiate such action at this time.

- Based on the arguments heard to date, the Commission is not persuaded that it is in the public interest for the Commission to initiate a review of all interconnection agreements and possibly alter them each time there is a new legal decision arguably affecting or bearing on a term therein. Reasonable continuity and finality to the terms of Interconnection Agreements is a legitimate public interest concern. To overcome that concern, a strong showing that the Commission's decisions regarding the unbundling provisions were wrong would be required, not simply that those decisions are no longer mandated by federal regulations.

- The Commission rejects USWC's suggestion that the Commission would violate the Court of Appeals decision if it took action to enforce the unbundling provisions of the USWC/MCIm Interconnection Agreement. The Commission is very respectful of the Court and is scrupulous to abide by its directives. In its orders, however, the Court of

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[4] See Consolidated Arbitration Proceeding, Docket Nos. P-442,421/M-96-855; P-5321,421/M-96-909; P-3167,421/M-96-729, ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING CONTRACT (March 17, 1997).

Appeals directed its analysis and decision to interpreting the Act and determining the validity of certain FCC rules promulgated thereunder, not to the validity of any existing Interconnection Agreements. By invalidating those rules, the Court indicated that it would be improper for any party to enforce those rules, as such. However, the Court did not address itself to the validity of any existing Interconnection Agreements. The Court did not even direct the party commissions to review commission-approved Interconnection Agreements for consistency with the Court's orders and revise them accordingly.[5] Hence, it does not appear that the Court intended its orders to impact the already-made decisions of state commissions or to alter the substantive terms of existing Interconnection Agreements. As such, USWC is acting on its own (not, as it suggests, as messenger for the Court) when it attempts to persuade the Commission to revise an approved Interconnection Agreement in response to the Court's order.

- In considering the persuasiveness of USWC's argument, the Commission is not persuaded. The Commission does not believe that its decision requiring the USWC and MCIm to adopt the unbundled provisions in question is necessarily inconsistent with the Court of Appeals decision. The fact that the Commission's March 17, 1997 Order explains its decision to approve AT&T's proposed unbundling language by referring to now-invalidated FCC rules does not mean that the Commission would not have made the same decision in the absence of the FCC rules and simply explained its decision using another legitimate analysis, e.g. consistency with state law and policy. In short, as a matter of logic, removal of one rationale for Commission action does not inexorably and automatically invalidate the initial decision and mandate the opposite decision, i.e. approval of USWC's proposed contract language restricting the purchase or recombination of unbundled elements, as USWC suggests.

Beyond noting the logical insufficiency of USWC's argument, the Commission is not inclined to reconsider its decisions in the December 2, 1996 and March 17, 1997 Orders on its own motion. The Commission is particularly disinclined to pursue the matter at this time since the question (whether the Commission's decisions in the December 2, 1996 and March 17, 1997 Orders should be reconsidered and amended) was not squarely presented and argued before the Commission. As a consequence, the record is inadequately developed on the point and provides an inadequate basis for such an initiative. Further suggesting the inadequacy of the record, the Commission notes that the lack of analysis of the issue by the public parties.

For all these reasons, the petition for reconsideration will be denied.

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[5] For that matter, the Commission does not view the unbundling provisions as necessarily inconsistent with the invalidity of the FCC rules and certainly the Eighth Circuit Court of Appeals did not rule that the unbundling provisions were invalid. In short, invalidation of the FCC rules does not render the unbundling provisions contrary to law as USWC contended.

ORDER

1. USWC's Request for Reconsideration is denied.

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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Office of the Secretary
Service Date
December 1, 1997

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. PETITION FOR ARBITRATION PURSUANT TO SECTION 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996 OF THE RATES, TERMS, AND CONDITIONS OF INTERCONNECTION WITH U S WEST.	)	CASE NO. USW-T-96-15 ATT-T-96-2
	)	ORDER NO. 27236

This is an arbitration proceeding initiated by AT&T Communications of the Mountain States, Inc. (AT&T) under provisions of the federal Telecommunications Act of 1996 (Act). The Act was enacted by Congress to foster competition in local telecommunications service markets. It enables potential competitors to enter local markets in any of three ways: by purchasing unbundled network elements from the incumbent local exchange carrier (LEC), by reselling the incumbent LEC's retail services purchased at wholesale rates, or by constructing their own facilities.

The first two methods for a competitor's market entry can be accomplished only with an agreement between the competitor and the incumbent LEC, and even a facilities-based competitor may need an agreement to provide for the exchange of customer traffic. The Act establishes certain duties for telecommunications carriers to facilitate the reaching of an agreement and requires active negotiation by the parties to precede an arbitration to resolve disputed issues. 47 U.S.C. §§ 251, 252. If the parties are unable to negotiate a final agreement, either party may request arbitration by a state utilities commission to resolve the open issues. AT&T initiated this arbitration as part of its effort to negotiate an interconnection agreement with U S WEST Communications, Inc. (U S WEST), to enable AT&T to enter the local telecommunications market in Idaho.

PROCEDURAL BACKGROUND

The procedural history of this case is lengthy and is briefly summarized in Order No. 27050 issued by the Commission on July 17, 1997. The Commission appointed an arbitrator to resolve the disputed issues and facilitate the completion of an agreement by the parties. Following extensive discovery, the presentation of evidence at an arbitration hearing and the filing of post-

hearing briefs, the arbitrator issued on March 24, 1997 a First Order Addressing Substantive Arbitration Issues (First Order). After more discussions, hearings and formal briefing, the arbitrator issued a Second Arbitration Order on June 9, 1997. The Commission then reviewed the record and the arbitrator's decisions and issued Order No. 27050 "as the resolution by arbitration of disputed issues pursuant to Section 252(b) of the Telecommunications Act." Order No. 27050, p. 5.

The parties were unable, however, to reach agreement on some contract issues that had not been presented to the arbitrator. In addition, the United States Court of Appeals for the Eighth Circuit on July 18, 1997 issued its decision in an appeal challenging the authority of the Federal Communications Commission (FCC) to specify certain terms for interconnection agreements. *See Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753 (8th Cir. 1997). The Court's decision potentially impacted several issues between U S WEST and AT&T. To resolve the remaining issues and consider the effect of the *Iowa Utilities Board* decision, the arbitrator participated in further discussions with the parties and accepted additional briefing. On August 26, 1997, the arbitrator filed a Third Arbitration Order. Finally, following the presentation of additional issues, the arbitrator filed a Fourth Arbitration Order on September 8, 1997.[1]

AT&T and U S WEST each filed a Petition for Review on September 8, 1997. Both Petitions requested review of issues decided in the four arbitration orders as well as our Order No. 27050. This, however, did not mark the end of the process to present the disputed issues to the Commission. As discussions for the interconnection agreement continued, the parties again could not agree on certain issues, mainly dealing with the price lists for services or products provided by U S WEST, and returned to the arbitrator for assistance. The arbitrator accordingly issued on October 6, 1997 his Fifth Arbitration Order. The Commission provided the parties an opportunity to raise issues for review based on the Fifth Order, and U S WEST filed a Supplemental Memorandum in Support of its Petition for Review on October 14, 1997.

This would have completed the presentation of issues for the Commission's review but for additional action, also occurring on October 14, 1997, by the Eighth Circuit Court of Appeals. The Court, granting petitions for review filed in the *Iowa Utilities Board* case, issued an amendment

[1] The arbitrator provided facsimile copies of the Fourth Order to the parties on September 5, 1997, presumably so that any issues resulting from the Fourth Order could be included in the parties' petitions for review filed with the Commission on September 8, 1997.

to its decision. The Court vacated an additional FCC rule relating to the purchase of unbundled network elements by a competitor LEC. Believing the amendment to the *Iowa Utilities Board* decision to be directly relevant to issues presented in this arbitration, U S WEST requested an opportunity to file an additional brief with the Commission, and AT&T requested an opportunity to respond. U S WEST thus on October 27, 1997, filed a Second Supplemental Memorandum in Support of its Petition for Review, and AT&T filed its Memorandum in Response on November 7, 1997.

Before we begin our discussion of particular issues, it is worthwhile to set forth the standards and policies that guide our review in this case. This is an arbitration rather than a full-scale adversarial proceeding brought to an administrative hearing before the Commission. This arbitration is brought after and in the midst of lengthy discussions by the parties to reach an agreement, and its purpose is to decide only those issues on which the parties are unable to reach an accommodation. In fact, although the issues presented in the arbitration are significant and numerous, many issues were voluntarily negotiated by the parties. The goal of this process is an interconnection agreement the parties are willing to sign.

The distinction between this arbitration and the usual adversarial proceeding is significant to the process for completing the case. For one, the usual appeal to the Idaho Supreme Court afforded by *Idaho Code* § 61-627 is not available, as the Act makes clear that a state court does not have jurisdiction to review an interconnection agreement. *See* 47 U.S.C. § 252(e)(4). Rather than an appeal, any party aggrieved by approval of an interconnection agreement can file "an action in an appropriate federal district court to determine whether the agreement . . . meets the requirements of Section 251 and this section [Section 252]." 47 U.S.C. § 252(e)(6).

Our review of the issues is guided by the standards of Sections 251 and 252 of the Act, as well as rules promulgated by the FCC to implement the Act's goals. However, the terms of the Act do not and cannot dictate specific results in each of the hundreds or thousands of details and complex issues that make up an interconnection agreement. This is especially true in light of the *Iowa Utilities Board* decision that rejected some of the FCC rules that specified results for significant issues, including pricing of unbundled network elements and wholesale rates. Instead, the Act provides parameters outside of which terms of an interconnection agreement may not go. On individual issues, any of several results can be permissible under the Act and FCC regulations,

and this arbitration will decide those issues if the parties cannot. Thus, the Act encourages the parties to voluntarily negotiate the terms of their agreement, but creates the arbitration process for the Commission to decide those issues, consistent with the terms of the Act and applicable regulations, on which the parties cannot or will not agree.

The nature and purpose of this arbitration and the requirements of the Act guide our resolution of the petitions for review. Because the goal is to provide terms for the completion of an agreement, we need not discuss issues on which the parties have agreed, or which have already been decided in a manner consistent with the Act and applicable regulations. We will address only those issues that remain open for decision or that may have been decided improperly in light of the Act, or where clarification will assist the parties' efforts to reach a final agreement.

A. ISSUES RAISED IN U S WEST'S PETITION FOR REVIEW

1. Unbundled Network Elements.

Prior to the arbitrator's Third Order, U S WEST argued that the Act prohibits what U S WEST refers to as "sham unbundling." This issue, listed as issue 25 in the First Order, is stated in that Order as follows:

> U S WEST observes that the separate pricing methods that apply to access to network elements and to services bought for resale can produce inequitable and unsound results in the case where AT&T purchases access to and recombines U S WEST elements without adding its own physical network elements. Specifically, U S WEST considers it inappropriate to allow AT&T to buy access to U S WEST switching and loops at element rates that, when combined, produce a price that would be substantially below the price that AT&T would pay for U S WEST retail services that it resells.

First Order, p. 11.

U S WEST raised the issue again following the *Iowa Utilities Board* decision, and the arbitrator revisited the issue in the Third Order at page 8-10. The arbitrator concluded that "the Eighth Circuit's opinion does not fundamentally alter the right of AT&T to take from U S WEST elements in an unseparated fashion." Third Order, p. 9. U S WEST in its initial petition for review memorandum did not identify a particular contract term it believes must be changed, but asked the Commission to "bar the practice of sham unbundling, and . . . clarify that U S WEST need only provide network elements to AT&T on an unbundled basis." U S WEST Petition, p. 7.

The spotlight focused again on AT&T's ability to purchase unbundled network elements following the Eighth Circuit Court's amendment to its *Iowa Utilities Board* decision. The Court struck down an additional FCC regulation promulgated to clarify the duty of incumbent LECs to provide unbundled network elements to competitor providers. U S WEST argues in its last memorandum that it "cannot be required to recombine unbundled network elements for any [competitor] LEC," and contends that "the proposed interconnection agreement between AT&T and U S WEST must therefore be modified to delete any requirement that U S WEST provide elements in a combined state for AT&T." U S WEST Second Supplemental Memorandum, p. 3, 5. Thus, U S WEST's argument regarding what it terms "sham unbundling" has changed during the course of events. Initially, U S WEST argued that AT&T should not be permitted to purchase all network elements required to provide local service at unbundled rates and thereby avoid purchasing packaged services at presumably higher wholesale rates. U S WEST now contends that it cannot be required to provide *any* combined elements to AT&T, because the Act requires AT&T to recombine elements it purchases as unbundled network elements.

In its Responsive Memorandum, AT&T contends that neither Section 251(c)(3) nor the Eighth Circuit Court's decision restrict the ability of a competitor LEC to purchase unbundled elements and recombine them in order to provide service. AT&T also contends that "simply eliminating language regarding combinations as proposed by U S WEST will render the agreement fatally incomplete and create significant barriers to entry." AT&T Responsive Memorandum, p. 7. According to AT&T,

> because the agreement in this case contemplated that U S WEST would provide elements in combination if requested by AT&T, the agreement contains no provisions for how U S WEST will uncombine, or how AT&T will combine, those elements. Further, it provides no information regarding exactly how AT&T will gain nondiscriminatory access to U S WEST's network to accomplish the combination of elements U S WEST chooses to separate. In addition, the agreement does not detail how customer outages and service quality concerns raised by the separation of elements will be eliminated or at least minimized.

AT&T Responsive Memorandum, p. 7.

AT&T also argues that state law can be applied to uphold the arbitrator's decision to prevent U S WEST from "tear[ing] apart its network elements so that new entrants must recombine

them" and "to uphold the arbitrator's decision that U S WEST must provide AT&T combinations of network elements." AT&T Responsive Memorandum, p. 8, 11. AT&T asks the Commission to approve the arbitrator's decision on access to unbundled network elements. Alternatively, because U S WEST must provide nondiscriminatory access to its network so that AT&T can recombine network elements, AT&T contends "the parties must be given an opportunity to negotiate terms and conditions for combining elements, bring any unresolved issues to arbitration and have contract language reviewed and approved by this Commission." AT&T Responsive Memorandum, p. 11.

To resolve these issues regarding access to unbundled network elements, we turn to the provisions of the Act, as well as the clarifications provided by the *Iowa Utilities Board* decision. Section 251(c)(3) of the Act describes the duty of an incumbent LEC to provide unbundled access as follows:

> The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, non discriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and non discriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

The *Iowa Utilities Board* decision rejected several FCC rules promulgated to implement the unbundling requirements of Section 251(c)(3). Initially, the Court vacated 47 C.F.R. § 51.315(c)-(f), FCC rules that required incumbent LECs to recombine network elements that are purchased by the competitor carrier on an unbundled basis. The Court noted that the last sentence of Section 251(c)(3) "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." *Iowa Utilities Board*, 120 F.3d at 813. In its amended decision, the Eighth Circuit Court also vacated 47 C.F.R. § 51.315(b), which provides that "except upon request, an incumbent LEC shall not separate requested network elements that the LEC currently combines."

The following requirements, stated in terms applicable to this case, are quite clearly enunciated by the Act and the *Iowa Utilities Board* decision: (1) U S WEST must provide to AT&T access to unbundled network elements; (2) AT&T can purchase any or all of the network elements it needs as unbundled elements; (3) U S WEST need not combine unbundled elements for AT&T, but U S WEST must provide the access AT&T needs to U S WEST's network in order to recombine

the unbundled elements. Other than broadly defining the term "network elements" to be unbundled, the Act does not provide guidance to incumbent LECs in determining the points at which elements must be unbundled, and the FCC rule prohibiting the decombining of currently combined elements has been vacated. However, the Act does not *prohibit* the sale of unseparated components as part of unbundled network elements.

With these rules in mind, we turn to the arguments presented by U S WEST. The first has been fairly well answered by the Eighth Circuit Court of Appeals in its conclusion that the Act does not restrict a competitor LEC from purchasing whatever element it needs on an unbundled basis. The Eighth Circuit stated that "the plain language of subsection 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network." *Iowa Utilities Board*, 120 F.3d at 814. The Court rejected the argument that the ability to select unbundled access over resale as the preferred route to enter the local telecommunications markets will nullify the resale provisions. The Court noted that "unbundled access has several disadvantages that preserve resale as a meaningful alternative." 120 F.3d at 815. For example, "with resale, a competing carrier can avoid expending valuable time and resources recombining unbundled network elements." *Id.* Thus, the initial "sham unbundling" argument made by U S WEST was directly rejected by the *Iowa Utilities Board* decision.

U S WEST also argues too broadly the effect of the Eighth Circuit Court's amendment to the *Iowa Utilities Board* decision. U S WEST contends that the Court's rejection of the rule preventing an incumbent LEC from separating network elements that it currently combines means that the interconnection agreement cannot require U S WEST to provide *any* elements in a combined state to AT&T. The problem with U S WEST's argument is that it goes too far. If an incumbent LEC were actually prohibited from providing any combined components to a requesting carrier, the access to unbundled elements requirement would be so impractical as to become meaningless. U S WEST would be required to break down each network element into countless physical components, and also provide access to its network at innumerable points so that AT&T could reconstruct them. Fully implemented, this result would add tremendous financial and technical burdens to both companies to the extent that the unbundled access requirement of Section 251(c)(3) would never be realized.

We do not believe Congress, or the Eighth Circuit Court, had this result in mind for the unbundled access requirement. By rejecting 47 C.F.R. 51.315(b), the Court did no more than recognize the distinction between the incumbent LEC's duty under Section 251(c)(3) to provide access to unbundled network elements and its duty under Section 251(c)(4) to offer its retail services at wholesale rates. The FCC rule was "contrary to 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis," and thereby "obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4)." *Iowa Utilities Board*, 120 F.3d at ___. It does not necessarily follow from the Court's rejection of the rule that the Act prohibits a LEC from permitting components that necessarily comprise unbundled network elements from remaining in their unseparated state as part of an interconnection agreement. Requiring a competing LEC to recombine the elements it purchases on an unbundled basis is not the same as saying the incumbent LEC can never leave unseparated components in their combined state.

We have reviewed the arbitrator's Third Order regarding access to unbundled elements, as well as Attachment 3 to the draft interconnection agreement. Section 1.2.1 of Attachment 3 identifies the unbundled network elements U S WEST will provide to AT&T, and Section 1.2.2 makes it clear that AT&T has the burden to recombine the unbundled elements. These provisions are consistent with Section 251(c)(3). U S WEST in its Second Supplemental Memorandum does not identify particular elements that it believes are impermissibly combined, but only argues that the interconnection agreement should "be modified to delete any requirement that U S WEST provide elements in a combined state for AT&T." The Act does not require the sweeping prohibition requested by U S WEST, and without more particular identification of the component combinations U S WEST believes are impermissible, we will not disturb the arbitrator's decision regarding access to unbundled elements.

2. Shared Transport.

Local telephone calls are transmitted over facilities that are either dedicated or common. Common local transport, or shared transport, is an interoffice transmission path between an incumbent LEC's end offices that is shared by other carriers. Shared transport also means that the route of a call is not necessarily predetermined. Instead, "for each call, the LEC must use its own routing table to determine which trunks to use, depending on the call's destination and the current

availability of circuits." U S WEST Second Supplemental Memorandum, p. 7. Because the LEC determines the most efficient route for each call at the time it is made, it is not necessary for the "requesting carrier to choose particular interoffice facilities or to specify the routing instructions for the call." U S WEST Petition, p. 7.

The arbitrator determined that "shared transport (between all U S WEST switches, but not between U S WEST and incumbent switches, or between U S WEST switches and serving wire centers) is an unbundled network element [and] should be included in the final agreement." Third Order, p. 11. U S WEST contends in its Petition for Review that shared transport is not, or should not be, available as an unbundled network element. U S WEST renews its argument in its Second Supplemental Memorandum, contending that the October 14, 1997 amendment to the *Iowa Utilities Board* decision supports its position. Because the transmission of a call requires access to several different network components, U S WEST argues that shared transport cannot itself be an unbundled network element.

U S WEST concedes, however, that FCC rules left undisturbed by the *Iowa Utilities Board* case require incumbent LECs to provide shared transport as an unbundled network element. *See*, FCC Local Interconnection Order, CC Docket No. 96-98, ¶ 439; FCC Third Order on Reconsideration, ¶ 44. Also, although shared transport was not specifically discussed in the *Iowa Utilities Board* decision, the Court upheld the FCC's broad determination of network elements subject to unbundling requirements. *See, Iowa Utilities Board*, 120 F.3d at 808-09. ("We believe that the FCC determination that the term 'network element' includes all of the facilities and equipment that are used in the overall commercial offering of telecommunications is a reasonable conclusion and entitled to deference").

We find that providing shared transport as an unbundled network element is reasonable and consistent with the requirements of the Act. First, as we discussed in the previous section, Section 251(c)(3) does not prohibit the use of unseparated components in unbundled network elements. If it did, every unbundled element would necessarily be broken down into numerous physical components. In the case of shared transport, a breakdown into the smallest identifiable components would not be possible until after the call is made, because by definition the route of the call is not specified in advance. The practical effect of U S WEST's interpretation of 251(c)(3) would be to make shared transport unavailable to competing LECs. Indeed, U S WEST argues that

it "cannot be required to provide unbundled access to transmission facilities between end offices." U S WEST Second Supplemental Memorandum, p. 9.

Second, requiring AT&T to designate in advance the routes for its customers' calls would greatly increase AT&T's costs to provide service. The arbitrator found that "foreclosing AT&T's use of the U S WEST transport element in a manner such as U S WEST uses them itself would build into AT&T's operations a significant cost disadvantage." Third Order, p. 11. To implement the unbundled elements requirements and determine which network elements should be made available, the Act directs the FCC to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. 251(d)(2)(B). The FCC determined that the requesting carrier's ability to provide a service would be impaired "if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises." First Report and Order, ¶ 285. The *Iowa Utilities Board* decision specifically upheld this standard for determining whether a network element should be made available to the competitor LEC:

> If the quality of the service declines or the cost of providing the service rises as a result of a requesting carrier's inability to gain access to a network element, then the requesting carrier's ability to provide the service has been made worse. The FCC's interpretation of the "impairment" standard is reasonable, and we give it deference.

Iowa Utilities Board, 120 F.3d at 812 (citations omitted). By this standard, AT&T's ability to provide local telecommunications service is impaired if shared transport is not available as a network element. We thus find it appropriate that the interconnection agreement should make shared transport available to AT&T as an unbundled network element, and we approve the arbitrator's resolution of the shared transport issue.

3. Points of Interconnection.

Both U S WEST and AT&T request review of the arbitrator's decision regarding points of interconnection, i.e., those places where a competitor LEC can interconnect with the incumbent's network. The Act requires that an incumbent LEC provide interconnection with its network "at any technically feasible point within the carrier's network." 47 U.S.C. § 251(c)(2). The First and Second Orders authorize AT&T's interconnection at any technically feasible point, but also authorize

the ADR process to adjust interconnection cost responsibilities where U S WEST can demonstrate that a substantially more economical means for connecting at an equally effective point exists.

In their Petitions, U S WEST argues that it should have greater latitude to control points of interconnection based on considerations of economy or efficiency, while AT&T contends that these considerations have no role in determining technical feasibility for points of interconnection. Order No. 25070 approved the resolution of these positions in the First and Second Orders, and we again approve the arbitrator's decision relative to points of interconnection. The arbitrator provided for AT&T's interconnection at any technically feasible point, as Section 251(c)(2) requires, but also provided an opportunity for the parties to adjust the costs of a particular interconnection if U S WEST can demonstrate that an equally effective but more economical interconnection point exists. This practical result is consistent with the terms of Section 251(c)(2). *See, Iowa Utilities Board*, 120 F.3d at 810.

4. Physical Collocation.

U S WEST in its Petition argues that the arbitrator did not limit AT&T's ability to physically collocate equipment on U S WEST premises. Section 251(c)(6) places a duty on U S WEST to allow AT&T to physically collocate its equipment on the premises of U S WEST. U S WEST may provide virtual rather than physical collocation upon proof to the Commission "that physical collocation is not practical for technical reasons or because of space limitations."

We believe the resolution of this collocation issue in the First Order is consistent with the requirements of Section 251(c)(6), and we thus decline to disturb the arbitrator's resolution.

5. Non-Recurring Charges.

The Fifth Order resolved pricing issues for loop unbundling, collocation charges, and certain nonrecurring charges. U S WEST does not object to the arbitrator's resolution of the first two issues, but does dispute the resolution for non-recurring charges.

The nonrecurring charges at issue apply to the ordering and installation of loops, ports, and signaling links. This issue was presented late in the arbitration. The arbitrator in his Fifth Order reviewed the record for these nonrecurring charges, and concluded that U S WEST's evidence that the range of $100 to $500 for these charges was essentially unrebutted, but that AT&T's evidence that the costs were "close to nothing" was also essentially unrebutted. Fifth Order, p. 3. The arbitrator, unable to undertake his own independent review of the U S WEST cost studies without

additional hearings, concluded that U S WEST "shall be entitled to charge 10 percent of the nonrecurring charges that its final price lists includes for loops, ports, and signaling links." Fifth Order, p. 5. However, the arbitrator also provided a means for the rates to be adjusted: "These charges shall be subject to true-ups retroactively to the commencement of service under the interconnection agreement, in the event that these charges are changed by later Idaho proceedings." *Id.*

It is evident in the Fifth Order that the arbitrator's substantial concerns about U S WEST's cost studies in support of nonrecurring charges left him unsatisfied that the evidence was reliable enough to finally determine the appropriate charges. Rather than delay the already lengthy proceedings any further, the arbitrator allowed the charges at amounts lower than requested by U S WEST and higher than argued by AT&T, and recognized that the amounts could be adjusted, and applied retroactively, in a subsequent proceeding. We find this to be an appropriate compromise solution for these charges, and we approve this resolution for the interconnection agreement. If either party finds after AT&T begins providing service under the agreement that the approved amounts are inappropriate, the parties should renegotiate the charge amounts. Should good faith efforts to change the amounts prove unsuccessful, either party may resolve any remaining disagreement through the agreement's dispute resolution procedure, or as part of a proceeding subsequently filed with the Commission.

6. Other Issues.

U S WEST identifies other issues for review, some of which were decided in the Third and Fourth Orders, some of which were agreed to by the parties somewhat at variance to language in the First and Second Orders, and some of which are merely points of clarification. We have reviewed these additional issues and have determined that adjustments to the arbitrator's resolution are not necessary, other than to clarify certain contract requirements.

As matters of clarity, the following is provided to assist in preparation of the final agreement:

(a) Issue 46, interim number portability pricing, the reference to "gross revenues" at page 33, Second Order, to apportion number portability costs refers to all intrastate and interstate revenues generated within the state of Idaho. This issue is further discussed in the next section of the Order.

(b) Issue 63, Quality Standards. Incumbent LECs are not required by the Act "to provide its competitors with superior quality interconnection", or to provide to requesting carriers "superior quality access to network elements on demand." *Iowa Utilities Board*, 120 F.3d at 812-13. Accordingly, the contract need not require more of U S WEST than the Act requires.

We have reviewed each issue raised by U S WEST in its Petition for Review. The adjustments and clarifications we make in this Order are consistent with the requirements of the Act. The issues that we did not discuss or alter are determined by the Commission to be properly resolved by the arbitration process.

B. ISSUES RAISED IN AT&T'S PETITION FOR REVIEW

1. Costs and Rate Issues.

The first four issues identified in AT&T's Petition relate to costs and rates. AT&T contends (1) the Commission should vacate its adjustment to the wholesale rate, (2) that adjustments should be made to the approved costs of loop unbundling, loop unloading and loop conditioning, (3) that the Commission should adopt AT&T's collocation rates, and (4) that the Commission should not adopt the approved rates and prices for the entire three-year term of the interconnection agreement.

These issues all were decided in the Commission's review of the First and Second Orders, and we are not persuaded that adjustments should be made to the approved resolution. The record on these cost and price issues is complex, extremely detailed and lengthy, and the evidence could be construed to support various specific results, including those advocated by AT&T. It is clear in the First and Second Orders that the arbitrator carefully considered all the evidence presented in resolving these issues. The Commission did the same in making two adjustments to produce a better overall balance among the competing and conflicting arguments and evidence the parties presented on the issue of the wholesale discount. AT&T does not contend that the resolution of these issues is incompatible with the terms of the Act, and we thus decline to make adjustments regarding the resolution of these issues.

2. Number Portability Costs.

AT&T contends that the arbitration orders regarding cost allocations for implementing number portability are "inconsistent with the Act and the FCC's Number Portability Order." AT&T Petition, p. 20. The First Order provides that U S WEST and AT&T should "track their costs of

providing interim number portability until a definitive method for allocating the cost is determined." First Order, p. 39. It is this allocation solution that AT&T contends is inconsistent with the Act and FCC requirements because it "is really not a standard at all." AT&T Petition, p. 20.

As AT&T concedes, however, the Second Order does contain a specific method for allocating number portability costs—"apportionment according to gross revenues of AT&T and U S WEST, less charges paid to other carriers." AT&T Petition, p. 17; Second Order, p. 33. AT&T nonetheless also objects to this approach as inconsistent with the methods recommended by the FCC.

We believe the Second Order's method of allocating number portability costs is consistent with recommendations of the FCC. The FCC specifically permits the use of gross revenues less payments to other carriers as an allocator. The Second Order provides that AT&T will pay number portability costs according to its share of gross revenues, less payments to other carriers (as compared with the same measure of U S WEST revenues). AT&T's Petition for Review recognizes that such a method is permitted by the FCC. Specifically, paragraph 136 of the FCC's July 2, 1996 First Report and Order and Further Notice of Proposed Rulemaking (CC Docket No. 95-116; RM 8535) cites MFS Illinois plans as one of those currently in use that satisfies the FCC's competitive neutrality criteria. That approach, as described in the FCC Order, appears to do exactly what the arbitrator did here; i.e., to apportion costs according to the gross revenues of the single incumbent and the single competitor involved in that situation.

We find that the Second Order's treatment of interim number portability costs is appropriate. To the extent, however, that the Second Order is unclear, the Commission makes it explicit that the share of costs that AT&T is required to pay for U S WEST's costs to make interim number portability available in Idaho is its gross revenues, less payments to other carriers, divided by the sum of its and U S WEST's gross revenues, less payments to other carriers.

Both AT&T and U S WEST note that the Second Order does not state explicitly whether the revenue base that is to be used to allocate number portability costs includes interstate revenues. Footnote 380 of the July 2, 1996 FCC Order addresses the issue of the costs to be included when gross revenues serve as the allocation basis. That footnote requires that the calculation of gross revenues meet two criteria—it must be limited to the revenues generated in the state involved and it must include intrastate and interstate revenues. Therefore, according to the FCC requirement, the

AT&T asks clarification of the means to resolve disputes over existing tariff conditions or restrictions. AT&T Petition, p. 52. The First Order provides that tariff disputes will be resolved through a "Bona Fide Request" (BFR) process rather than an ADR process.

We believe an ADR process is better to resolve disputes over tariff conditions and restrictions, and the interconnection agreement should include this modification from the First Order.

(b) Issue 17-NID indemnification clause.

AT&T objects to the specific NID indemnification provisions required by the First Order, citing a conflict with the general indemnification language in another part of the agreement. There can be, however, a valid need for a separate indemnification provision for a specific circumstance, in which case the general provision would be controlled by the specific. The First Order addresses situations where AT&T must provide additional protectors to use the U S WEST NID. AT&T has the alternative of making a NID-to-NID connection, in which case the general indemnification clause would apply. Once AT&T chooses to make physical changes to the U S WEST NID, which it would presumably do to save costs, it is appropriate to assign to it the greater risks involved.

We have reviewed each of the issues raised by AT&T in its Petition for Review, and have discussed only those issues on which adjustment or clarification should be made. It is the Commission's understanding that with this Order all disputed issues have been resolved by the arbitration process. The parties should be able to complete their final agreement and submit it to the Commission pursuant to 47 U.S.C. §252(e).

ORDER

IT IS HEREBY ORDERED that the five orders of the arbitrator, as modified or clarified by this Order or Order No. 27050, constitute the resolution by arbitration of disputed issues pursuant to Section 252(b) of the Telecommunications Act. This Order also resolves all issues raised by AT&T and U S WEST in their Petitions for Review.

THIS IS A FINAL ORDER ON ARBITRATION. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

AT&T and U S WEST gross revenues that are to be used to calculate the apportionment of interim number portability costs are the intrastate and interstate revenues generated in Idaho.

3. Possible Rebundling Charge.

AT&T argues that the provision in the First Order that contemplates an opportunity for U S WEST in the future "to propose for combined switching and loop element prices a surcharge that will promote facilities-based competition" is inappropriate. *See*, First Order, p. 14. AT&T contends that such a surcharge would violate terms of the Act.

The First and Second Orders, which were approved in Order No. 25070, do not authorize a surcharge for combining switch and loop elements. The arbitrator merely indicated that circumstances might develop where such a price surcharge could be appropriate. By approving the arbitrator's recommendation that U S WEST be afforded an opportunity to demonstrate the appropriateness of price adjustments under certain circumstances, the Commission was not indicating approval of any specific adjustment or surcharge. Accordingly, we do not find that any adjustment must be made regarding this issue.

4. Operating Support System Development and Implementation Costs.

At page 31-32 of its Petition, AT&T addresses an issue relating to costs for developing and implementing an operational support system (OSS). An OSS is a computer application that provides gateways for competitor LECs to access where necessary U S WEST's computer operating systems. AT&T contends that the agreement should only address OSS development costs for the Idaho jurisdiction, and requests that "it be made clear that only the Idaho proportionate share of the total gateway development costs . . . be considered in this arbitration agreement." AT&T Petition, p. 31.

We agree that this point can benefit from clarification. The agreement between U S WEST and AT&T, over which this Commission has jurisdiction, relates to services within Idaho. Accordingly, it is appropriate that the OSS costs covered by the agreement are limited to Idaho-specific costs and to the Idaho proportionate share of regional costs. The agreement should specify that the competing carrier's responsibility for OSS development and implementation costs is limited to the Idaho proportionate costs.

5. Other Issues.

(a) Issue 29—use of ADR process rather than BFR process.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 15th day of December 1997.

DENNIS S. HANSEN, PRESIDENT

RALPH NELSON, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Myrna J. Walters
Commission Secretary

VId/O;USW-T-96-13.wn3

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Second Compulsory Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company.	)	Case No. TC-98-115

REPORT AND ORDER

Issue Date: December 23, 1997

Effective Date: January 2, 1998

The Special Master points out that those standards are anticipated to be finalized shortly and that AT&T's proposed language allows for an interim method to transmit the necessary data so that service is not delayed. The Special Master recommends adoption of AT&T's proposed language.

In its November 26 response, SWBT argues that OBF has defined the ordering requirements for some UNEs, such as loop and port, and that it should not be required to expend resources on interim solutions that are specific to AT&T that are not contained in the finalized industry standards set out by OBF.

The Commission finds that AT&T's proposed language would only require SWBT to use industry guidelines when they are available, and that AT&T's proposed language should be adopted.

C. Group IV Issues - UNE PARITY

Issue 1 (Parity: Overview) and Issue 2 (Ordering, Provisioning, and Maintenance: Access to Information)

These issues require the Commission to determine how the parity standards in the existing interconnection agreement and in the Act apply to UNEs. For both issues, the Special Master recommends that AT&T's proposed language be adopted. Under Issue 1, the parties dispute whether SWBT can charge separately for each UNE ordered by AT&T, even when such UNEs are to be used in combination, and whether SWBT is required to meet performance quality standards for combinations or platforms of elements. Under Issue 2, the parties dispute whether SWBT must provide AT&T information concerning dispatch and due date requirements when it provides other pre-service ordering information for unbundled elements ordered in combination.

According to the Special Master, the issues in dispute concern parity for UNEs when used in combination, and AT&T's proposed language is consistent with the Act. The Special Master asserts that without parity standards applied to UNEs used in combination, AT&T cannot be guaranteed nondiscriminatory access and comparable performance and quality. The Special Master points to relevant Federal Communications Commission (FCC) rules, the Act, and the recent decision of the United States Court of Appeals for the Eighth Circuit in *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (hereinafter *Iowa Utilities Bd.*), as well as specific contract language in the approved interconnection agreement between SWBT and AT&T as support. With regard to Issue 2, the Special Master states that dispatch and due date functionality must be included with UNE ordering and provisioning terms or there will be no parity between SWBT's services and AT&T's.

SWBT's November 26 response to the Special Master objected to his recommendation on Issue 1 because the *Iowa Utilities Bd.* court has decided that UNEs must be combined by CLECs, not ILECs. SWBT argues further that, even if it were required to combine UNEs for AT&T, the service being provided for AT&T customers would not be "equivalent" because UNEs are not equivalent to any SWBT service. SWBT reaches this conclusion because "UNEs are provided on an unbundled basis and only to CLECs." SWBT opposes any performance parameters that differ from those specified in Attachment 17 of the existing agreement for individual UNEs. AT&T's response does not add to its prior filings. However, the Commission notes on its own that AT&T's proposed language explicitly limits performance standards to those already set forth in Attachment 17.

With regard to dispatch and due date requirements, SWBT argues that standard intervals for AT&T to obtain access to this information are already set forth in Attachment 17. SWBT alleges that, while resold services are subject to dispatch and due date requirements, UNEs are not and so there is no reason to establish new dispatch and due date access processes when UNEs are ordered in combination. SWBT does not cite any legal authority for its position. AT&T has not responded to the Special Master's recommendation on Issue 2, but the Commission notes that AT&T's proposed language for resolving Issue 1 would preserve the standards set forth in Attachment 17. This should alleviate SWBT's concerns about new standards.

The Commission notes first that § 251(c)(3) of the Act states that ILECs have:

> [t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. § 251(c)(3). Both the *Iowa Utilities Bd.* decision and § 251(c)(3) of the Act require the ILEC to provide UNEs in a nondiscriminatory manner that permits the CLEC to combine the elements as it sees fit. They do not go so far as to require the CLEC to purchase UNEs separately and then recombine them, at the time of the order, if the ILEC already uses the elements specified by the CLEC in the same combination that the CLEC requests. SWBT has not pointed to any provision requiring disassembly and

then reassembly of identical service, and nothing in AT&T's language attempts to force SWBT to combine elements for AT&T.

Moreover, Section 2.1 of Attachment UNE (Attachment 6) of the approved SWBT/AT&T interconnection agreement states:

> SWBT will permit AT&T to designate any point at which it wishes to connect AT&T's facilities or facilities provided by a third party on behalf of AT&T with SWBT's network of access to unbundled Network Elements for the provision by AT&T of a Telecommunications Service. If the point designated by AT&T is technically feasible, SWBT will make the requested connection.

Additionally Section 2.4 of Attachment UNE of the approved SWBT/AT&T interconnection agreement states:

> SWBT will provide AT&T access to the unbundled Network Elements provided for in this Attachment, including combinations of Network Elements, without restriction.

Finally, Section 2.8 of Attachment UNE of the agreement states that:

> Except upon request, SWBT will not separate requested network elements that SWBT currently combines.

The Commission finds that SWBT's proposed language is contrary to agreed-upon and approved language.

The Commission finds that AT&T's proposed language on Issue 1 implements the prior agreement of the parties and should be adopted. In addition, the Commission finds that it should adopt the language proposed by AT&T for resolution of Issue 2 in order to ensure UNE parity. If AT&T does not have dispatch and due date requirements available to it as with other pre-service ordering information, AT&T cannot provide service to its customers that is equivalent to SWBT's.

Issue 3 (Interconnected and Functional Network Elements), Issue 4 (Service Disruption With IDLC), Issue 7 (Automated Testing), Issue 10 (Automated Testing Through EBI), Issue 14b (Input-Output Port) and Issue 16 (Combining Elements)

For all six of these issues, the Commission must address the extent of SWBT's obligation to provide combined UNEs. Issue 3 involves SWBT's ability to disconnect elements that are ordered in combination by AT&T when those elements are already interconnected and functional at the time of the order. Issue 4 addresses whether SWBT may interrupt service to rearrange loop facilities on working service served by Integrated Digital Loop Carrier (IDLEC) technology when AT&T orders the loop and switch port in combination. Issue 7 addresses whether SWBT must provide automated loop testing through the local switch rather than install a loop test point when AT&T utilizes a SWBT unbundled local loop and SWBT unbundled switch port in combination. Under Issue 10, the dispute is over AT&T's right to initiate and receive test results through EBI, and under Issue 14b, the parties dispute AT&T's right to have access to Input/Output ports at locations other than in AT&T's collocation space. Issue 16 is whether the agreement should provide for SWBT to combine those elements that are not interconnected in the SWBT network at the time of AT&T's order.

For all of these issues, the Special Master recommends adoption of AT&T's proposed language because SWBT has already agreed not to separate requested network elements that SWBT currently combines, referring to Sections 2.1, 2.4 and 2.8 of Attachment UNE (Attachment 6). Moreover, the Special Master states that Issues 3 and 4 involve functions included within the full functionality of the switching element already purchased by AT&T. If there is to be parity, SWBT must provide the functions requested by AT&T

in the manner that it provides such functions to itself. Parity is required for the reasons set forth under Issues 1 and 2, above.

The Commission finds that SWBT is bound by this contractual language because the Eighth Circuit's recent ruling in *Iowa Utilities Bd.* has not made SWBT's and AT&T's contract provisions illegal. The decision simply vacated FCC rules which required that ILECs combine elements; it did not prevent ILECs from volunteering to combine such elements. Also, the Commission concurs with the Special Master's reasoning on Issues 3 and 4 related to parity. The Commission finds that AT&T's proposed language should be adopted for Issues 3, 4, 7, 10, 14b and 16.

Issue 14c (Switch Capability)

This issue involves the information SWBT should be required to provide to AT&T concerning the features, functions and capabilities of each end office. The difference between the parties is primarily over AT&T's access to information concerning the identity of the specific programs installed, rather than just information concerning the capabilities of the network.

The Special Master recommends adoption of SWBT's language because AT&T's proposed language may require SWBT to provide its competitors with proprietary business information. SWBT's proposed language would provide AT&T with adequate information to operate effectively. The Commission has reviewed the language proposed by both parties and their arguments in support and agrees that SWBT's proposed language should be adopted.

Issue 14d (Expedited Special Request Process)

This issue is limited to a determination of the amount of time that SWBT should have to respond to an expedited special request made by

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic.	)))))	Case No. 96-922-TP-UNC

SECOND ENTRY ON REHEARING

The Commission finds:

(1) On June 18, 1997, the Commission issued an Opinion and Order addressing in detail the total element long run incremental cost (TELRIC) studies submitted by Ameritech Ohio (Ameritech) in this matter. These TELRIC studies were intended to establish the rates for unbundled network elements which Ameritech proposes to charge competitors for provisioning unbundled network elements as required by the Telecommunications Act of 1996 (1996 Act)[1] and this Commission's local service guidelines set forth in Case No. 95-845-TP-COI (845 Guidelines).

(2) On September 18, 1997, the Commission issued an Entry on Rehearing modifying and clarifying, to the limited extent addressed therein, the June 19, 1997 Opinion and Order.

(3) On October 20, 1997, applications for rehearing of the Commission's September 18, 1997 Entry on Rehearing were timely filed by Ameritech, AT&T Communications of Ohio (AT&T), and MCI Telecommunications Corporation (MCI) pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code. Memoranda contra the applications for rehearing were timely filed by Ameritech and jointly by AT&T and MCI.

(4) In their joint application for rehearing, AT&T and MCI aver that the Commission erred in its September 18, 1997 Entry on Rehearing concerning the application of the 20 percent reduction in shared costs. AT&T and MCI allege that, rather than adopt their position and reduce the shared cost percentage

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1 Codified as 47 U.S.C. 151 *et seq.*

2 Consistent with their earlier practices in this matter, AT&T and MCI submitted a joint application for rehearing.

originally proposed by Ameritech by 20 percent, the Commission predominately adopted the Ameritech recommendation for treatment of shared costs which relies upon unsupported demand forecasts. The Commission's ruling is, according to AT&T and MCI, against the weight of the evidence presented at the hearing.

(5) Rehearing on this issue is denied. The Commission fully considered the evidence of record in making the clarification of shared costs set forth in our September 18, 1997 Entry on Rehearing. We have consistently noted that Ameritech's proposed methodology for allocating shared costs was a reasonable starting point; however, we also share theconcerns raised by the intervenors (including AT&T and MCI) with particular inputs into the shared cost calculation. In fact, we specifically pointed to the insufficient evidence in the record supporting Ameritech's demand forecasts as one of the justifications for reducing the pool of recoverable shared costs by 20 percent. Therefore, contrary to the position expressed by AT&T and MCI, we did consider the lack of evidence supporting the demand forecasts when reaching a decision on the issue of shared costs.

It was also not unreasonable for us to acknowledge in the September 18, 1997 Entry on Rehearing that adopting AT&T and MCI's position on shared costs recovery (namely, that the 20 percent reduction should have been made to the percentage mark-up which resulted from the applicationof the shared costs to the extended TELRICs proposed by Ameritech) would amount to a double reduction in the amount of recoverable shared costs. It is undisputed by AT&T and MCI that the overall effect of the Commission's June 19, 1997 Opinion and Order as modified on rehearing actually reduced the TELRIC prices proposed by Ameritech. Thus, it is clear that inserting the lower TELRIC prices into a shared cost calculation multiplied by a percentage mark-up reduced by 20 percent (as proposed by AT&T and MCI) would result in an unjustified additional reduction in Ameritech's recoverable joint costs. On the other hand, permitting Ameritech to recovery the entire pool of joint costs (as reduced by 20 percent to reflect the legitimate concerns expressed by the intervenors regarding the lack of evidence supporting particular itemsproposed to be recovered) does not result in an unjustified additional reduction in Ameritech's recoverable joint costs. For these reasons,

the joint application for rehearingsubmitted by AT&T and MCI must be denied.

(6) Ameritech argues in its application for rehearing that the Eighth Circuit Court of Appeals (Eighth Circuit), in a Order on Rehearing issued October 14, 1997, conclusively determined that Section 251(c)(3) of the 1996 Act does not obligate an incumbent local exchange carrier (ILEC), such as Ameritech, to permit a competitive local service provider to purchase an assembled platform of combined elementsin order to offer competitive telecommunications services.[3] Rather, Ameritech avers, the Eighth Circuit was clear that an ILEC must provide access to the network elements only on an unbundled (as opposed to a combined) basis. Consequently, Ameritech maintains that the September 18, 1997 Entry on Rehearing must be modified in two respects. Namely, the Commission should eliminate Ameritech's obligation to perform cost studies for combinations of two or more unbundled network elements. Also, the Commission should cancel the further proceedings intended to investigate whether or to what extent Ameritech must provide "common transport" as requested by a number of competitive local service providers.

(7) Ameritech's application for rehearing concerning certain unbundled network combinations it agreed to provide to AT&T and MCI in their respective interconnection agreements as well as the cancellation of further proceedings on the issue of shared/common transport is denied.

Regarding combinations, the Commission found that the obligation to conduct and produce cost studies regarding certain network element combinations, agreed to by Ameritech as part of an arm's length negotiation with AT&T and MCI and incorporated into the parties' respective interconnection arrangements, was valid and enforceable. The Eighth Circuit's Order on Rehearing notwithstanding, Ameritech's agreement, through the give and take of an arm's length negotiation process, establishes an independent basis upon which to enforce the terms of the interconnection arrangements, as negotiated, and to require thecompany to provide TELRIC studies for certain unbundled network combinations. In so doing, we are enforcing the terms of the

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3 *Iowa Utilities Board v. FCC*Nos. 96-3321, et al., Order on Petitions for Rehearing (October 14, 1997).

4 The Commission approved AT&T's interconnection agreement in Case No. 96-752-TP-ARB and MCI's in Case No. 96-888-TP-ARB on February 20, 1997, and May 22, 1997, respectively.

interconnection arrangement to which Ameritech agreed. In making this decision, we affirm our previous position that we are not passing judgment on the manner in which Ameritech proposes to price the network element combinations it agreed to provide as part of the interconnection agreements. Rather, without an actual cost study, with supporting documentation, we have no way of knowing whether theprices Ameritech proposes to charge AT&T andMCI for unbundled network element combinations are reasonable. It should also be noted that the Eighth Circuit's October 14, 1997 Order on Rehearing is not at all clear regarding state decision-making. The decision centered on the FCC's authority under federal law relative to the states and did not address statection under federal law or state action under state law. We need not reach this issue at this time since our local guidelines, for the present, appear to be generally similar to the Eighth Circuit's decision on combinations. We will continue to examine this issue in the future as it is presented to us.

Ameritech's request for a cancellation of the further proceeding to investigate theissue of shared/common transport is likewise denied. As noted in the September 18, 1997 Entry on Rehearing, the issue of shared/commontransport is highly complex and has engendered significant debate. Conflicting decisions being rendered by the Federal Communications Commission (FCC) and the Eighth Circuit Court oAppeals further complicates this matter. It is clear, however, that the FCC, when faced with a similar argument as that made to this Commission by Ameritech, rejected Ameritech'scontention and found shared transport to be an unbundled network element.[5] Thus, at a minimum, Ameritech must submit for our review and approval a TELRIC study on the unbundled network element of shared transport as defined by the FCC. The Eighth Circuit's October 14, 1997 Order on Rehearing, which further clarified the issue of combinations, only reinforces our earlier determination that shared/common transport be subject to a further inquiry designed to sort out precisely what Ameritech's obligations are on the issue. For all the foregoing reasons, Ameritech's October 20,1997 application for rehearing is denied.

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5 Ameritech disdnguishes "common transport" from "shared transport".. The former, according to Ameritech, represents basic network connectivity and, as such, is a transport service as compared to shared transport which is a network element. Common transport is, Ameritech maintains, thus inextricably interwined with switching.

It is, therefore,

ORDERED, That the applications for rehearing timely filed by Ameritech and jointly by AT&T and MCI are denied as set forth in Findings (5) and (7). It is, further,

ORDERED, That copies of this Entry on Rehearing be served upon all parties of record, their counsel, and any other interested person of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Craig A. Glazer, Chairman

Jolynn Barry Butler

Ronda Hartman Fergus

David W. Johnson

Judith A. Jones

JKJ:geb

Entered in the Journal
NOV 6 1997

A True Copy

Gary E. Vigorito
Secretary

ATTACHMENT 8

ORDER NO. 98-021

ENTERED JAN 09 1998

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

ARB 3
ARB 6

In the Matter of the Petition of AT&T Communications of the Pacific Northwest, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996. (ARb 3)	)
In the Matter of the Petition of MCI Metro Access Transmission Services, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996. (ARB 6)	)

ORDER

DISPOSITION: PETITION DENIED

On September 5, 1997, the Public Utility Commission of Oregon (Commission) issued Order No. 97-341 in this consolidated proceeding. Order 97-341 approved executed interconnection agreements between AT&T Communications of the Pacific Northwest, Inc. (AT&T) and U S WEST Communications, Inc. (USWC), and between MCI Metro Access Transmission Services, Inc. (MCI) and USWC (jointly "the Agreements").

On October 27, 1997, USWC filed a petition requesting that the Commission reform the Agreements to conform with recent rulings of the United States Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. Federal Communications Commission*, 120 F3d 753 (8th Cir.; 1997), *modified*, No. 96-3321, slip. op., (October 14, 1997). According to USWC, the Eighth Circuit held that interconnection agreements arbitrated under the Telecommunications Act of 1996 (Act) may not require incumbent local exchange carriers (ILECs) to (a) rebundle unbundled elements; (b) provide a combination of unbundled elements that equate to a finished service (*e.g.*, retail flat rate business service); or (c) provide unbundled elements or services that have quality standards different from those used by the ILEC for their own services. USWC claims that the Agreements approved in this proceeding contain all of these impermissible requirements. Accordingly, it asks the Commission to convene a proceeding to reform and revise the Agreements. Pending the outcome of such proceeding, USWC further

requests that the Commission stay enforcement of contract provisions pertaining to rebundling.[1]

On November 13, 1997, AT&T and MCI filed responses in opposition to USWC's petition. Respondents argue, *inter alia*, that USWC's petition is premature and procedurally improper.

The Commission agrees that USWC's petition is premature. Section 19.5 of the Agreements provides, in part:

> In the event that *any final and nonappealable legislative, regulatory, judicial or other legal action* materially affects any material terms of this Agreement, or the ability of CLEC or ILEC to perform any material terms of this Agreement, CLEC or ILEC may, on thirty (30) days' written notice (delivered not later than thirty (30) days following the date on which such action has become legally binding and has otherwise become final and nonappealable) require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. (Emphasis added).

Section 19.5 requires that any judicial action which materially affects any material term of the Agreement must be final and nonappealable before the parties undertake to modify the Agreements. As MCI observes, this provision is designed to provide a orderly process for dealing with the legal uncertainties encountered implementing the Act.

The Eighth Circuit decisions regarding service quality and access to unbundled elements clearly affect material terms of the Agreements. Both AT&T and MCI have notified the Commission that they have appealed the Eighth Circuit decisions to the United States Supreme Court.[2] That being the case, the judicial actions relied upon by USWC are not final and nonappealable and its request to modify the Agreements is premature.

The Commission finds that the petition should be denied for the reasons stated above. It is unnecessary to consider the remaining arguments advanced by the parties.

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[1] USWC states that it has been presented with several orders from MCI which request USWC to rebundle unbundled elements or provide a combination of elements that equate to a finished service. Although USWC has rejected those orders, it notes that MCI has sought monetary fines in another jurisdiction because of USWC's refusal to process unbundled orders. In view of these circumstances, USWC requests that the Commission stay enforcement of the agreements.

[2] These documents are included in the official file of this proceeding. The Commission takes official notice of these documents pursuant to OAR 860-014-0050(1)(c).

ORDER NO. 98-021

ORDER

IT IS ORDERED that the petition filed by USWC on October 27, 1997, is denied.

Made, entered, and effective JAN 0 9 1998.

Ron Eachus
Chairman

Roger Hamilton
Commissioner

Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to ORS 756.580.

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